Docket for 03-9046

(9)

No. 03-9046 *** CAPITAL CASE ***
Title: Charles Russell Rhines, Petitioner
v.
Douglas Weber, Warden
Docketed: February 23, 2004
Lower Ct: United States Court of Appeals for the Eighth Circuit
Case Nos.: (02-2990)
Decision Date: October 7, 2003
Rehearing Denied: November 24, 2003
Questions Presented

Date	Proceedings and Orders
Feb 19 2004	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due March 24, 2004)
Mar 16 2004	Brief of respondent Douglas Weber, Warden in opposition filed.
Apr 1 2004	DISTRIBUTED for Conference of April 16, 2004.
Jun 21 2004	DISTRIBUTED for Conference of June 24, 2004.
Jun 28 2004	Motion of petitioner for leave to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jul 23 2004	Motion to appoint counsel filed by petitioner.
Aug 2 2004	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including September 3, 2004.
Aug 4 2004	Motion DISTRIBUTED for Conference of September 27, 2004.
Sep 2 2004	Joint appendix filed.
Sep 2 2004	Brief of petitioner filed.
Sep 3 2004	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Sep 13 2004	Extension of time within which to file respondent's brief on the merits to and including October 25, 2004.
Oct 4 2004	Motion to appoint counsel filed by petitioner GRANTED. Roberto A. Lange, Esquire, of Sioux Falls, South Dakota is appointed to serve as counsel for the petitioner in this case.
Oct 25 2004	Brief of respondent Douglas Weber, Warden filed.
Oct 25 2004	Brief amici curiae of California, et al. filed.
Nov 12 2004	SET FOR ARGUMENT ON Wednesday, January 12, 2005.
Nov 12 2004	CIRCULATED.
Nov 29 2004	Reply of petitioner Charles Russell Rhines filed. (Distributed)
Dec 15 2004	Record received from U.S.C.A. - 8th Circuit. (1 box)
Dec 29 2004	Letter from counsel for the petitioner received. (Distributed).
Jan 10 2005	Record received from U.S.D.C. for Dist. of South Dakota. (1 box)
Jan 12 2005	Argued. For petitioner: Roberto A. Lange, Sioux Falls, S.D. (Appointed by this Court.) For respondent: Lawrence E. Long, Attorney General, Pierre, S.D.

03-9046 (6)

No. [redacted]

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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Supreme Court U.S.
FILED
FEB 19 2004

(a) Questions Presented for Review

CAPITAL CASE

1. Can a federal court stay (rather than being compelled to dismiss) a §2254 habeas corpus petition which includes exhausted and unexhausted claims, when the stay is necessary to permit a petitioner to exhaust claims in state court without having the one year statute of limitations in the Antiterrorism and Effective Death Penalty Act (AEDPA) bar the right to a federal petition?

2. Is the Eighth Circuit correct that dismissal of a mixed §2254 petition is mandated by Rose v. Lundy, or are the courts of appeals for the first, second, sixth, seventh and ninth circuits correct in following the separate concurrences of Justice Souter and Justice Stevens in Duncan v. Walker that a stay of an otherwise timely filed federal petition is permissible in light of the AEDPA?

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(d) Citations to Opinions

The district court decision is unreported, but found at Tab 1 in the Appendix. This appeal is from the Eighth Circuit's reversal of the district court decision, which is Rhines v. Weber, 346 F.3d 799 (8th Cir. 2003), rehearing en banc denied, ____F.3d _____, No. 02-2990 (8th Cir. Nov. 24, 2003), Tab 2 in the Appendix. That decision incorporates the analysis and ruling in Akins v. Kinney, 341 F.3d 681 (8th Cir. 2003), Tab 3 in the Appendix.

The affirmance of the capital murder conviction of Mr. Rhines is State v. Rhines, 548 N.W.2d 415 (S.D. 1996) cert. denied 519 U.S. 1013 (1996), at Tab 4 in the Appendix. The denial of Mr. Rhines' first state habeas petition is reported at Rhines v. Weber, 608 N.W.2d 303 (S.D. 2000), which is Tab 5 in the Appendix.

(e) Basis of Jurisdiction

The Eighth Circuit issued its opinion on October 7, 2003, and denied the petition for rehearing en banc on November 24, 2003. Jurisdiction in this Court rests on 28 U.S.C. § 1254(1).

(f) Certain Provisions of Law

Article 1, Section 9 of the United States Constitution:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

28 U.S.C. § 2254(a)

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2244

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
> (D) The date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation until this subsection.

(g) Concise Statement of Case.

Petitioner Rhines was sentenced to death for a murder perpetrated during an after hours burglary of a doughnut shop in Rapid City, South Dakota. Rhines raised certain constitutional challenges to his conviction on direct appeal and through a state habeas corpus case. Although the South Dakota Supreme Court found a part of the South Dakota death penalty statute unconstitutional in its application to Rhines, his conviction and death sentence were affirmed.

On February 22, 2000, Rhines filed a pro se habeas petition under 28 U.S.C. § 2254. Rhines also filed pro se a "Motion to Toll Time" out of concern about the one year limitations period set by the Anti-terrorism and Effective Death Penalty Act (AEDPA). Respondent Warden Weber responded asking that the motion "be denied because it is unnecessary, only (8) or (14) days having run on the Section 2244 1-year statute of limitations." The federal district court agreed with Respondent Weber and denied the motion.

The district court on July 3, 2002, determined that Rhines had filed a mixed petition. By that point, Rhines' federal petition had been pending for nearly two and a half years. If Rhines' petition were to be dismissed at that point, the AEDPA would forever bar Rhines from refiling a §2254 petition. Rhines had moved for a stay of the federal habeas corpus proceeding to allow him to return to state court to seek to exhaust the claims, if the petition were found to be a mixed petition. The district court granted a stay, relying upon the concurrences of Justice Stevens and Justice Souter in Duncan v. Walker and other decisions from courts of appeals commending a stay "when the original habeas petition, though unexhausted, is timely filed, but there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely." See Appendix Tab 1 at p.9.

Respondent appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit reversed the stay, relying upon its decision in Akins v. Kinney, which was issued while the Rhines case was before the Eighth Circuit. In the Akins case, the Eighth Circuit chose to follow pre-AEDPA and pre-Duncan authority in refusing to allow a district court to stay such a petition. The Eighth Circuit recognized that its ruling put the Eighth Circuit at odds with other circuits that have considered the issue. On November 24, 2003, the Eighth Circuit denied rehearing en banc on the issue presented here.

(h) Reasons the Writ Should Be Granted.

The decision of the United States Court of Appeals for the Eighth Circuit in this case conflicts with decisions from the United States Courts of Appeals for the First, Second, Sixth, Seventh, and Ninth Circuits on the same issue. The Courts of Appeals for the First, Second, Sixth, Seventh and Ninth Circuits follow the separate concurrences of Justice Souter and Justice Stevens in Duncan v. Walker, 533 U.S. 167 (2001), permitting a stay of the federal §2254 habeas petition, when it is a mixed petition and when dismissal of the petition will result in a bar under the one year limitation of the Antiterrorism and Effective Death Penalty Act (AEDPA). This petition presents a conflict between United States courts of appeals under Rule 10(a) of the Supreme Court Rules, and also presents an important question of federal law that has not been, but should be, settled by the United States Supreme Court under Rule 10(c) of the Supreme Court Rules.

In 1996, Congress passed the AEDPA, which, among other things, placed a one year limitations period on the time a person convicted in state court has to file a federal section 2254 habeas petition. 28 U.S.C. §2244(d)(1). In Duncan v. Walker, 533 U.S. at, 181-82, this Court determined that the filing of a federal habeas petition does not toll the statute of limitations in the AEDPA. The majority opinion in Duncan v. Walker did not reach the issue presented by this Petition for Writ of Certiorari. Id. at 181. Unlike Rhines in this case who filed his federal habeas petition when only 8 to 14 days, by respondent's own admission, had run on the one year limitation, the Petitioner in Duncan v. Walker had delayed more than nine months in filing a federal habeas petition after his first one was dismissed without prejudice. Id.

The two concurring opinions in Duncan, however, did address the issue presented by this petition. In this concurring opinion in Duncan, Justice Stevens wrote:

> First, although the Court's pre-AEDPA decision in Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1998, 71 L.Ed.2d 397 (1982), prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so, when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but nonmeritorious claims, see 28 U.S.C. § 2254 (b) (2) (1994 ed., Supp. V), and when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period.

Duncan, 533 U.S. at 182-83.

In his separate opinion, Justice Souter wrote:

> Although I join the Court's opinion in full, I have joined Justice Steven's separate opinion pointing out that nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies, and that a claim for equitable tolling could present a serious issue on facts different from those before us.

Id. at 182.

Since Duncan, the United States Courts of Appeals for the First, Second, Sixth, Seventh, and Ninth Circuits have permitted federal district courts to stay §2254 habeas petitions when a dismissal would jeopardize the Petitioner's ability to obtain federal review in light of AEDPA's one year statute of limitations. Nowaczyk v. Warden, New Hampshire State Prison, 299 F.3d 69, 79 (1st Cir. 2002); Zarvela v. Artuz, 254 F.3d 374, 380 (2d Cir. 2001), cert denied, 534 U.S. 1015 (2001); Palmer v. Carlton, 276 F.3d 777, 781 (6th Cir. 2002); Freeman v. Page, 208 F.3d 572, 577 (7th Cir. 2000), cert. denied, 531 U.S. 946 (2000); Brambles v. Duncan, 330 F.3d 1197, 1203 (9th Cir. 2003). As one Court of Appeals has described it, "there is a growing concensus that a stay is required when dismissal could jeopardize the Petitioner's ability to obtain federal review [under AEDPA's limitation.]" Nowaczyk, 29[illegible] F.3d at 79.

The United States Court of Appeals for the Eighth Circuit presently stands alone in determining that a district court lacks the ability to stay a federal habeas petition when the

AEDPA one year limitation has run during a time the federal petition was pending. Rhines v. Weber, 346 F.3d 799 (8th Cir. 2003), rehearing en banc denied, ___F.3d____, No. 02-2990 (8th Cir. Nov. 24, 2003); Akins v. Kinney, 341 F.3d 681, 685-87 (8th Cir. 2003). The Eighth Circuit based its decision on the pre-AEDPA case of Rose v. Lundy, 455 U.S. 509 (1982), in which this Court adopted the total exhaustion rule requiring district courts to dismiss habeas corpus petitions that are mixed. However, as the Eighth Circuit noted, when the Court decided Rose v. Lundy, there was no federal time limit on the Petitioner's ability to file a Section 2254 Petition, and thus there was no risk to the Petitioner from dismissing a petition without prejudice. Id.; Akins, 341 F.3d at 685.

The rationale for staying a federal habeas case in light of AEDPA notwithstanding Rose v. Lundy was explained by the United States Court of Appeals for the Second Circuit in Zarvela v. Artuz, 254 F.3d 374 (2nd Cir. 2001), as including the following:

> ". . . [T]he enactment of AEDPA has altered the context in which the choice of mechanics for handling mixed petitions is to be made. Before AEDPA, there was no statute of limitations. In that context, Justice O'Connor could write, "[O]ur interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." [Rose v. Lundy, 455 U.S.] at 520, 102 S.Ct. at 1198. With unlimited time, a prisoner could leisurely consider all possible federal claims and develop state court writs to exhaust them. After AEDPA, the prisoner has just one year. If he mistakenly comes to federal court too soon, i.e., with one or more unexhausted claims, and does so late in the allotted one year, a dismissal of his mixed petition risks the loss of all of his claims because the one year limitations period will likely expire during the time taken to initiate state court exhaustion and to return to federal court after exhaustion is completed.

Id. at 379.

The principles of Rose v. Lundy are served by a stay of a federal habeas corpus petition to allow an inmate to return to state court. In Rose v. Lundy, this Court based its decision on the fact that it "would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional

violation." Rose v. Lundy, 455 U.S. at 518. That is, federal courts apply the doctrine of comity, "which teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter." Id. at 518 (quoting Darr v. Buford, 339 U.S. 200, 204 (1950)). Staying the exhausted claims would be a traditional way to "defer" to state court "until" that court has had an opportunity to exercise its jurisdiction over a habeas petitioner's unexhausted claims. Zarvela, 254 F.3d at 380.

The Zarvela court also addressed the concern that a petitioner could taken an undue amount of time to pursue state court remedies. In Zarvela, the court required that the petitioner exercise "reasonable diligence" in filing his state court claim. Id. at 381. In Rhines' case, the district court required reasonable diligence by allowing Rhines just sixty days to file the claim, and sixty days to return to the federal court after his claim was disposed of by the state court. See Appendix at Tab 1. As South Dakota law permits, Rhines filed a second state habeas petition within sixty days of the court's ruling notwithstanding this appeal. See Jackson v. Weber, 637 N.W.2d 19 (S.D. 2001).

This Court has not addressed the issue raised by this Petition, other than in the concurrences of Justice Souter and Justice Stevens. This Court recently granted a petition for writ of certiorari to the Ninth Circuit in Pliler v. Ford., 124 S.Ct. 981, 157 L.Ed. 2d 811, 72 U.S. L.W. 3446, sub. nom. Ford v. Hubbard, 330 F.3d 1086 (9th Cir. 2003) which appears to involve a related but different issue.

There now exists a split in authority among the circuits as to whether, as stated in Justice Steven's concurrence, a district court may "retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies" in the wake of the one

year AEDPA limitation. This is an important question not only to Rhines, but also to all habeas petitioners who file timely 2254 Petitions and wait out the remaining one year period for the district court to determine if complete exhaustion exists. The United States federal courts and federal petitioners deserve to know whether the law is as contained in the concurrences of Justice Stevens and Justice Souter and as five courts of appeal have held, or whether the law is, as the Eighth Circuit has held, unyielding dismissal of mixed petitions under Rose v. Lundy without leaving a district court discretion to stay a timely filed petition now time barred under the AEDPA.

Dated at Sioux Falls, South Dakota, this 19th day of February, 2004.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Petitioner/Appellee, hereby certifies that two true and correct copies of the foregoing "Petition For Writ of Certiorari" were served upon:

Larry Long
Craig M. Eichstadt
Office of the South Dakota Attorney General
500 E. Capitol Avenue
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by First Class Mail on February 19, 2004.

ORIGINAL

(5)

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No. 03-9046

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OR CERTIORARI

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QUESTIONS PRESENTED

-- CAPITAL CASE --

1. May a federal court stay, rather than dismiss, a habeas application by a prisoner convicted before a state court (28 U.S.C. § 2254) where the petition includes both exhausted and unexhausted claims, and where the Petitioner had a full opportunity to present the claims to the State court, but failed to do so, and where the State prisoner has the present right to pursue exhausted claims in federal court?

2. Is the Eighth Circuit rule, which requires a state prisoner to present all federal constitutional claims that the prisoner may have to the state courts at the first available opportunity, while still permitting the state prisoner to assert exhausted claims before the federal court, the correct rule, in accord with Rose v. Lundy, 455 U.S. 509 (1982) and Duncan v. Walker, 533 U.S. 167 (2001)?

LIST OF PARTIES

The parties to this case are Charles Russell Rhines, Petitioner, held under sentence of death by the State of South Dakota, and his custodian, Douglas Weber, Warden, South Dakota State Penitentiary, Sioux Falls, South Dakota.

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CITATIONS TO OPINIONS

The district court decision, District of South Dakota, Western Division, the Honorable Karen E. Schreier presiding, is unreported. It is found in Tab 1 of the Petition to the Appendix, (hereinafter Pet. App.). The present case arises from the appeal to the Eighth Circuit, which reversed the District Court decision. This Eighth Circuit decision is reported at Rhines v. Weber, 346 F.3d 799 (8th Cir. 2003), reh'g denied, No. 02-2990 (8th Cir. Nov. 24, 2003). This Eighth Circuit case is set forth in Pet. App. Tab 2. Petitioner also includes the ruling of Akins v. Kinney, 341 F.3d 681 (8th Cir. 2003) as Tab 3 in Pet. App. The Eighth Circuit incorporated the rationale of Akins into its Rhines decision.

State court decisions include State v. Rhines, 1996 S.D. 55, 548 N.W.2d 415, which is set forth at Pet. App. Tab 4 and is the affirmance of Petitioner's state conviction and death sentence. The case of Rhines v. Weber, 2000 S.D. 19, 608 N.W.2d 303 is Tab 5 of Pet. App. This case is the denial of post-conviction habeas corpus relief by the South Dakota Supreme Court.

JURISDICTION

The Petition for Certiorari is timely. The Eighth Circuit denied the Petition for Rehearing on November 24, 2003, and Petitioner filed the Petition on February 19, 2004. Petition at 10. Jurisdiction is based upon 28 U.S.C. § 1254(1).

PROVISIONS OF LAW

28 U.S.C. § 2244 provides:

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2254, State custody; remedies in Federal courts provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

. . . .

STATEMENT OF THE CASE

In this case, Petitioner seeks habeas corpus relief from the federal courts after both his direct appeal and his state habeas corpus application were denied. The United States District Court, District of South Dakota, Western Division, held that the petition contained both exhausted and unexhausted claims, but that the petition should be held in abeyance, and not dismissed, pending exhaustion of certain claims before the state courts.

The United States Court of Appeals for the Eighth Circuit assumed the correctness of the District Court's holding that there were both exhausted and unexhausted claims, but reversed the District Court's ruling that the petition could be held in abeyance pending exhaustion of state court remedies, and

remanded so that Petitioner could determine whether he wished to have the petition dismissed, or pursue his federal habeas remedy on those issues that had already been exhausted before the State courts.

1. Facts of the Crime.

The facts of the crime are taken primarily from the South Dakota Supreme Court Decision on direct appeal, found at Pet. App. 5. Although the Petition Appendix is not separately numbered, finding the location of passages in the case can be accomplished by citation to the page of the Northwest Second Reporter where the passage appears as well as to the paragraph number.

From the latter part of 1991 through February of 1992, Petitioner worked at the Dig'em Donut Shop on West Main in Rapid City, South Dakota. Petitioner was fired in February of 1992. State v. Rhines, 1996 S.D. 55, ¶ 1, 548 N.W.2d 415, 424 (hereinafter Rhines). The body of Donnivan Schaefer, an employee at the donut shop, was found in the storeroom. His hands were bound, and he had been repeatedly stabbed. Approximately $3,300 in cash, coins, and checks were missing from the donut shop. Id. at ¶ 2, 548 N.W.2d at 424.

Petitioner later confessed to killing Donnivan. He told the police that while he was burglarizing the donut shop, Donnivan unexpectedly appeared. Rhines, 1996 S.D. 55, ¶ 158, 548 N.W.2d at 451. When he encountered Donnivan, Petitioner stabbed him in the abdomen. Donnivan fell down, thrashed about,

and screamed Petitioner's name. Petitioner then stabbed him again in the back, piercing his left lung. Id. At this time, Petitioner could hear air whistling out of the wound in Donnivan's back. His victim assured Petitioner that he would tell no one of the burglary, and begged Petitioner to spare his life. Id. Petitioner then walked Donnivan to the storeroom in the back of the donut shop, where his body was later found. He placed Donnivan's head between his knees, and forcefully thrust the knife into the base of his skull. Petitioner's claim was that Donnivan continued to breathe and his arms were moving, so he tied the victim's hands behind his back. Id. Petitioner referred to his final blow as the "coup de grace." Id. at ¶ 162, 548 N.W.2d at 452. The South Dakota Supreme Court found that Donnivan's hands may well have been tied behind his back before this final blow was inflicted. Id. The South Dakota Supreme Court found the evidence sufficient to show, among other things, torture. Id.

In conducting its proportionality review, the South Dakota Supreme Court detailed the brutality of the slaying, together with the cold-blooded, unfeeling, uncaring attitude of Petitioner. "His arrogant and cold-blooded attitude toward his offense was made shockingly apparent in his own words and in his own voice." Rhines, 1996 S.D. 55, ¶ 208, 548 N.W.2d at 458. When interrogating officers informed Petitioner that a pathologist had suggested that the victim might have been tied up before the last stab wound, Petitioner responded, "Too bad he

wasn't there. To watch.", and then Petitioner burst into laughter. Id. at ¶ 208, 548 N.W.2d at 458. In explaining Donnivan's movements after the fatal wound, Petitioner compared him to a butchered chicken. Id. Petitioner laughed intermittently throughout the law enforcement interview, and did not spontaneously express any feeling of remorse. Id. When asked whether he was sorry that Donnivan was dead, Petitioner replied "Yeah" and then proceeded to explain to the officers that he wanted to "get off." Id.

2. History of the Proceedings.

Petitioner was charged with the burglary and murder described above. Id. at ¶ 3, 548 N.W. 2d at 424. Trial commenced January 4, 1993. The jury found Petitioner guilty of first degree murder and third degree burglary on January 22, 1993. App. 22. The same jury sentenced Petitioner to death by lethal injection for the first degree murder conviction, finding the existence of four separate aggravating factors. App. 22.

Petitioner appealed to the South Dakota Supreme Court. That court affirmed, Rhines, 1996 S.D. 55, 548 N.W.2d 415. The court did find that one of the four aggravating circumstances was invalid, but found further that this invalidity did not so taint the penalty proceedings as to mandate reversal of the death sentence. Id. at ¶ 169, 548 N.W.2d at 453. This Court denied certiorari. Rhines v. South Dakota, 519 U.S. 1013 (1996).

Petitioner then sought habeas corpus relief in the state circuit court. App. 1. The state trial court denied relief, and the South Dakota Supreme Court affirmed. Rhines v. Weber, 2000 S.D. 19, 608 N.W.2d 303. The South Dakota Supreme Court found that there was no ineffective assistance of counsel, reiterated its holding on direct appeal, and also upheld its previous finding that consideration of an invalid aggravating circumstance was harmless error. Id.

Petitioner next sought habeas corpus relief from the United States District Court of the District of South Dakota. App. 10. The District Court, the Honorable Karen E. Schreier, extended a stay of execution and made various procedural orders. Although the District Court did not rule on the merits, it did hold that it would retain jurisdiction over the case while Petitioner returned to state court to exhaust remedies on issues that he did not earlier bring to the state court. Pet. App. 1.

Respondent appealed to the United States Court of Appeals for the Eighth Circuit, which cited its case of Akins v. Kinney, 341 F.3d 681 (8th Cir. 2003) for the proposition that the District Court was required to either dismiss the case or Petitioner was required to proceed on those issues that had been exhausted in the state courts. Petitioner requested rehearing, which the Eighth Circuit denied on November 24, 2003. Petitioner filed his Petition in this Court on February 19, 2004.

REASONS FOR DENYING THE WRIT

While conflict exists between the decision of the Eighth Circuit in this case and the decisions of other circuit courts of appeal, the Eighth Circuit decision was a correct interpretation. Certiorari should, therefore, be denied.

The Eighth Circuit ruling below was concise. See Pet. App. 2. The Eighth Circuit held that it had jurisdiction under the collateral order doctrine to review the matter, and then held that its ruling in Akins, 341 F.3d at 685-87 precluded a stay where a petition contained both exhausted and unexhausted claims. Since there could be no stay, the Eighth Circuit reversed the district court order granting such a stay and remanded for a determination of whether Petitioner would delete unexhausted claims while proceeding only on the claims he believed to be fully exhausted. The Eighth Circuit also held that Petitioner might elect to forgo further state court proceedings, in which case he would presumably proceed on all claims in the federal habeas action and contest any argument that the unexhausted claims were procedurally barred in state court. The Eighth Circuit felt that these issues were better addressed initially by the District Court and remanded the case for further consideration.

The State does not contest Petitioner's argument that this ruling conflicts with rulings of various federal courts of appeals, many of which are cited in the petition. The Eighth Circuit in Akins, 341 F.3d at 685-86, cited cases from the

first, sixth, seventh, and ninth circuits, which it acknowledged to be in conflict with its decision. The petition also cites a case from the Second Circuit, Zarvela v. Artuz, 254 F.3d 374, 379 (2d Cir.) cert, denied, 534 U.S. 1015 (2001), which also appears to be in conflict with the Eighth Circuit decision.

This Court has granted certiorari in Pliler v. Ford, No. 03-221, a case in which the Ninth Circuit approved a process of staying and holding in abeyance a habeas petition containing both exhausted and unexhausted claims while petitioner attempts to further exhaust state remedies. Also pending before this Court are Adams v. Brambles, No. 03-357, Pliler v. Hunt, No. 03-520, Alameida v. Smith, No. 03-699, and Akins v. Kinney, No. 03-7339, the case that the Eighth Circuit cited as controlling precedent in this case. The Court has also denied certiorari in several cases raising the same question, including Zarvela, 254 F.3d at 380, cert. denied, 534 U.S. 1015 (2001) and Freeman v. Page, 208 F.3d 572, 577 (7th Cir.), cert. denied, 531 U.S. 946 (2000). Respondent acknowledges further that this case squarely raises the issue. Both parties agree that the habeas petition before the district court in this case contains both exhausted and unexhausted claims, although they disagree as to which claims are exhausted or unexhausted.

This Court has granted certiorari in Pliler v. Ford, which apparently raises the same issue. Respondent argues, however, that certiorari should be denied in this case because the Eighth Circuit has correctly resolved the issue.

The seminal case on the issue of the AEDPA statute of limitations is Duncan v. Walker, 533 U.S. 167 (2001). In Duncan, this Court held that the AEDPA statute of limitations, 28 U.S.C. § 2244(d)(2), should be read literally. When so read, the time during which a federal habeas petition has been pending is not excluded from the one-year statute of limitations. Rather, only such time as passed while Petitioner had a post-conviction petition pending before state courts will be excluded. Duncan, 533 U.S. at 172-74. In Duncan, the Court reserved the issue of whether a petition containing both exhausted and unexhausted claims could be held in abeyance rather than being dismissed. 533 U.S. at 181. This procedure was suggested by Justice Stevens in a concurrence. Duncan, 533 U.S. at 183. While the Court expressly reserved the issue, its language makes it plain that one purpose of the statute of limitations was encouraging litigants to pursue claims in the state courts as early as possible, and specifically to seek state relief prior to seeking federal collateral review. Id. at 180. Petitioner's proposed rule would eviscerate and render meaningless the one-year statute of limitations. Under Petitioner's interpretation, he would not be required to first exhaust state remedies and then file a federal habeas petition as soon as possible, as this Court found to be the purpose of the statute. Id. at 180. Rather, the requirement to first exhaust state remedies would be effectively abolished. Petitioner could file his federal habeas petition, have the

district court hold it in abeyance, and then return to state court to exhaust state remedies. This procedure is exactly the reverse of that required by this Court in Duncan.

Further, the holding of Duncan was that filing a federal habeas petition does not toll the AEDPA statute of limitations. Adopting Petitioner's argument would nullify this holding. Petitioner could file a federal habeas petition at any time, either before or after filing a state habeas corpus petition, so long as there was not at least one year when he had no proceeding pending in state court. The district court could then hold the petition in abeyance for an undetermined time while Petitioner exhausted state remedies. The petition would remain filed in the federal court during this entire time. Since there would be a petition on file in federal court, the statute of limitations would not run. There would be a federal petition on file, in contravention of this Court's directive that litigants first exhaust state remedies and then file federal habeas petitions as soon as possible. Duncan, 533 U.S. at 180. There would be no requirement that the Petitioner first exhaust state remedies before coming to federal court, in contravention of Duncan. Exhaustion could occur either before or after a filing in federal court. The adoption of Petitioner's argument would thus encourage and foster unlimited delay in the resolution of petitions containing both exhausted and unexhausted claims.

While some members of the Court have observed that a petitioner would not want to delay the resolution of his case, Duncan, 533 U.S. at 191 (Breyer, J., dissenting), delay is definitely the friend of those prisoners, such as Petitioner, who are under sentence of death. A death-sentenced inmate has no incentive to pursue a speedy resolution of his case. Under the district court holding, and the rule advocated by Petitioner, however, any death-sentenced inmate could hold back on making claims to the state courts repeatedly and ask the district court to stay resolution of his case anytime he "discovers" the claims that he has not previously asserted in the state courts. There is a powerful incentive for a death-sentenced defendant to do this. The rule Petitioner advocates would eliminate the salutary effect of the AEDPA statute of limitations in this and other capital cases. Finality would be undermined, and, as a practical matter, eliminated. Petitioner will have no incentive to first exhaust his state remedies and then come to the federal courts. Duncan, 533 U.S. at 180.

Petitioner will point out, of course, that he is put to the choice of either asserting exhausted issues, or, if he accepts dismissal, risking that he will not be permitted to have his case decided in the federal courts. This choice is the necessary corollary of an effective statute of limitations. This Court has stated that petitioners will be required to exhaust their state remedies at the earliest available

opportunity. Duncan, 533 U.S. at 180. This Court has also stated that exhaustion should be required prior to petitioners seeking the remedy of federal habeas corpus. These principles would be weakened, or eliminated, if Petitioner's rule were adopted. Because the Eighth Circuit correctly decided this case, certiorari should be denied.

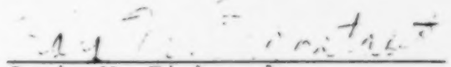
CONCLUSION

Respondent requests that certiorari be denied. In the alternative, since both parties recognize that a conflict between the circuit courts of appeals exists, the matter might reasonably be held without ruling on the Petition pending the Court's decision in Pliler v. Ford, No. 03-221.

Dated this 1st day of March, 2004.

Respectfully submitted,

LAWRENCE E. LONG
ATTORNEY GENERAL



Craig M. Eichstadt
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Pierre, SD 57501-5070
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APPENDIX

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STATE OF SOUTH DAKOTA)
:SS
COUNTY OF PENNINGTON)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

CHARLES RUSSELL RHINES,
Petitioner,

vs.

DOUGLAS WEBER,
Warden of the South Dakota
State Penitentiary,
Respondent.

CIVIL FILE NO. 96-1070

SECOND AMENDED APPLICATION
WRIT OF HABEAS CORPUS

Comes now the petitioner, Charles Russell Rhines, a prisoner in the South Dakota State Penitentiary, by and through his court-appointed counsel of record on this habeas corpus proceeding, Michael W. Hanson, and hereby moves the Circuit Court of Pennington County for a writ of habeas corpus under SDCL §21-17. This application is based on the following grounds:

1. Petitioner is currently a prisoner in the South Dakota State Penitentiary, Sioux Falls, South Dakota. Petitioner is under a sentence of death entered on January 29, 1993, for his conviction of first degree murder. A copy of the judgement is attached to this application.

2. Petitioner's conviction and death sentence have been affirmed on appeal by the South Dakota Supreme Court, State v. Rhines, 1996 S.D. 55, 548 N.W. 2d 415; and the United States Supreme Court has declined to review the appellate judgement.

3. That the officer by whom petitioner is so imprisoned and so restrained is Douglas Weber, Warden, South Dakota State Penitentiary.

4. The Judgement of Conviction and Sentence and resulting restraint is illegal and unconstitutional, for the following reasons:

1.

BEST AVAILABLE COPY

A. That Petitioner during the trial preparation phase, trial and appellate phase of his case had ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution. Said assistance of counsel was ineffective for the following reasons:

1. Two of petitioner's court appointed attorneys Joseph M. Butler and Michael Stonefield never met with petitioner before the start of the trial, except for a brief meeting at the initial appearance. That the assistance of these two attorneys was ineffective because of their complete lack of pre-trial preparation.

2. That only one of the petitioner's three court appointed attorneys met with him in the jail before the trial started. This attorney was Wayne F. Gilbert. Petitioner has now learned that Wayne F. Gilbert was suffering from mental depression during this time period. Furthermore, it is believed that he was engaged in criminal or other conduct in violation of the code of professional responsibility during this time period. This is evidenced by the fact that after the trial Wayne F. Gilbert voluntarily turned in his license to practice law and was disbarred. It has now been learned that he plead guilty to theft and received a suspended imposition of sentence. These factors make his representation ineffective within the meaning of the Sixth Amendment to the United States Constitution.

3. That Petitioner's attorneys failed to cross examine some of the prosecution's witnesses.

4. That Petitioner's attorneys failed to call a witness who lived in Rapid City and was available and willing to

2.

give mitigation evidence.

5. That petitioner's attorney Joseph Butler told the jury that he believed in and supported the death penalty.

6. That petitioner's attorney failed to raise the issue, in their appellate arguments, that the trial court's refusal to answer the jury's questions on prison life, that were submitted by them, violated due process.

7. That petitioner's attorneys failed to cite the case of Simmons v. South Carolina, 512 U.S. 154 (1994), in support of any claim that the trial court's refusal to answer the jury's questions on prison life violated due process.

8. That petitioner's attorneys failed to effectively argue that the death sentence in this case was disproportionate to the facts of the case and to other similar factual situations.

9. That Wayne Gilbert remained as petitioner's attorney when it was found out that a secretary in his office was the wife of the lead investigator of this case for the Rapid City Police Department.

10. That petitioner's attorneys failed to communicate with petitioner and get his input on matters concerning the trial.

11. Petitioner's attorneys were unprepared for the voir dire portion of the trial and conducted an ineffective voir dire.

12. Petition's attorneys were unprepared for the trial and penalty phase of the trial and were ineffective.

13. That Petitioner's attorneys were ineffective

and committed prejudicial error by not making formal motion for a change of venue, on the grounds of adverse pre-trial publicity and forcing the trial judge to rule on the issue and thus preserving it for appellate review.

14. That Petitioner's attorneys were ineffective and committed prejudicial error by telling the jury during the voir dire stage of the trial that the Petitioner was homosexual.

15. That petitioner's attorneys were ineffective and committed prejudicial error, by not filing a motion and seeking an order, to prevent the prosecution from bring up evidence or testimony that the Petitioner was homosexual.

16. Petitioner's attorneys were ineffective and committed prejudicial error by not objecting to the prosecutor's attempts to get the medical examiner to say that the victim had been tied up before he died, when they knew from personal conversations with the medical examiner that he could not so determine.

17. Petitioner's attorneys were ineffective and committed prejudicial error by not objecting to the last minute introduction of the Victim Impact Statement or in the alternative not asking for a continuance so that they could prepare a rebuttal.

18. Petitioner's attorneys were ineffective and committed prejudicial error by not objecting to the reading of the victim impact statement by the victim's mother, instead of a disinterested third party.

19. Petitioner's attorneys were ineffective and committed prejudicial error by not making a motion to allow the petitioner to give an unsworn allocation to the jury at the penalty

phase of the trial.

20. Petitioner's attorneys were ineffective and committed prejudicial error, by not arguing that the police officer's statement, that there had been no executions in South Dakota since 1947, was an enticement to get petitioner to confess and that the state had implied that there was no real possibility of receiving a death sentence if he confessed.

21. Petitioner's attorneys were ineffective and committed prejudicial error, by not approaching the Prosecutor about dropping the intention to seek the death penalty, if petitioner would testify about the full involvement of Sam Harter in this case.

22. Petitioner's attorneys were ineffective and committed prejudicial error, by not submitting a proposed jury instruction for the penalty phase of the trial, that would instruct the jury that you are not to consider the number of possible aggravated circumstances, but to consider only if the state has proved the existence of one beyond a reasonable doubt.

23. Petitioner's attorneys were ineffective and committed prejudicial error by not submitting a proposed jury instructions for the penalty phase of the trial, that would instruct the jury that they were not to look at unrelated and separate possible aggravated circumstances and combine them to find the existence of one.

24. Petitioner's attorneys were ineffective and committed prejudicial error by never investigating Petitioner's background so that an effective mitigation argument could be raised at the penalty phase of the trial.

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25. Petitioner's attorneys were ineffective and committed prejudicial error, in not attacking Heather Shepard's testimony, on the grounds that the police reports show that they clearly suggested to her the things necessary to corroborate Petitioner's confession.

26. Petitioner's attorney's were ineffective and committed prejudicial error in not attacking the victim impact statement with the evidence they had that the victim had not been faithful to his fiancee.

B. That a constitutional law violation occurred when the trial court refused to suppress Charles Rhine's statements of June 19 and 21, 1992.

C. That the trial court's excusing for cause prospective juror Diane Stoeffler, violated due process and equal protection of the laws.

D. The State's calculated and selective use of peremptory challenges to exclude prospective jurors with reservations about the death penalty violated due process.

E. That the trial court's refusal to answer the questions submitted by the jury on the subject of "the reality of Life Without Parole", violated due process.

F. The South Dakota capital punishment statutes violate due process and equal protection of the law.

G. Charles Rhines was denied due process of law by the trial court allowing victim impact testimony.

H. The evidence was insufficient to sustain the jury's finding of torture under aggravating circumstances §23A-27A-1 (6), with resulting due process of law violation.

6

I. The trial court erred in its instructions regarding aggravating circumstance §23A-27A-1 (6), depravity of mind, so as to commit a due process of law violation.

J. The trial court erred in its instructions regarding aggravating circumstance §23A-27A-1 (3), so as to commit a due process of law violation.

K. The jury's consideration of one or more invalid aggravating circumstances violated due process and equal protection of the law.

L. The trial court by allowing into evidence statements made by Rhines concerning the justice system violated due process.

M. The trial court in refusing to appoint a forensic communication expert denied Charles Rhines due process of law.

N. The trial court by refusing several of Rhines' proposed jury instructions denied him due process.

O. The death sentence was imposed under the influence of passion, prejudice or other arbitrary factors so as to constitute a violation of equal protection of the laws and due process.

P. The imposition of a death sentence in this case was disproportionate to all the other homicide cases in South Dakota so as to violate equal protection of the law and due process.

Q. The use of State v. Moeller by the state, to show that the death sentence was not disproportionate violated due process.

R. The prosecutor committed prejudicial misconduct, in violation of Petitioner's Due Process Rights, when the prosecutor asked the medical examiner, if the victim was tied up before or after death, when the prosecutor knew in advance that the medical examiner could not determine when the victim had been tied up.

7

S. The prosecutor committed prejudicial misconduct in violation of Petitioner's Due Process Rights, by never coming out and saying that he would introduce a victim impact statement until the day the penalty phase of the trial started.

T. The prosecutor committed prejudicial misconduct in violation of Petitioner's Due Process Rights, when he made reference to the Petitioner "gutting" the victim, when the evidence clearly showed that no such thing occurred.

U. The prosecutor committed prejudicial misconduct in violation of Petitioner's Due Process Rights, by introducing into evidence enlarged photographs of the victim, in which the stab wounds were disproportionately enlarged, to reflect an attempt to "gut" the victim.

WHEREFORE, Petitioner requests:

A. The Court issue a Writ of Habeas Corpus, requiring Respondent to serve and file an Return to said Writ;

B. For the Court to schedule a hearing to determine the legality of the Pennington County conviction of Charles Russell Rhines, to determine if the Judgement of Conviction should be declared null, void, and unconstitutional and if he should be relieved of all restraints imposed thereby; and

C. Whether a new trial should be ordered, or in the alternative if a new penalty trial should be ordered and;

D. For such other and further relief as the Court deems just, fair and equitable.

Dated this 17th day September, 1997.

8

Michael W. Hanson

Michael W. Hanson
Attorney for the Petitioner
505 W. 9th Street, #100
Sioux Falls, S.D. 57104
(605) 332-8227

Pennington County, S.D.
FILED
IN CIRCUIT COURT
SEP 19 1997
Renae Truman, Clerk of Courts
By _____ Deputy

9

AO 241 (Rev. 5/85) PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District SOUTH DAKOTA, SOUTHERN DIVISION	
Name CHARLES RUSSELL RHINES	Prisoner No. 28414	Case No. CIV00-4032

Place of Confinement: SOUTH DAKOTA STATE PENITENTIARY, SIOUX FALLS, MINNEHAHA COUNTY, SOUTH DAKOTA

FILED
FEB 22 2000

Name of Petitioner (include name under which convicted): CHARLES RUSSELL RHINES

Name of Respondent (authorized person having custody of petitioner): V. DOUGLAS WEBER, WARDEN: SOUTH DAKOTA STATE PENITENTIARY

The Attorney General of the State of SOUTH DAKOTA: MARK BARNETT

PETITION

1. Name and location of court which entered the judgment of conviction under attack SEVENTH JUDICIAL CIRCUIT COURT, RAPID CITY, PENNINGTON COUNTY, SOUTH DAKOTA

2. Date of judgment of conviction JANUARY 2 , 1 3

3. Length of sentence DEATH AND TEN YEARS

4. Nature of offense involved (all counts) FIRST DEGREE MURDER AND THIRD DEGREE BURGLARY

5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

10

9. If you did appeal, answer the following:
   (a) Name of court SOUTH DAKOTA SUPREME COURT
   (b) Result CONVICTION AND SENTENCE AFFIRMED
   (c) Date of result and citation, if known MAY 16, 1996:STATE V. RHINES: 1996 SD 55; 548 N.W. 2d 415
   (d) Grounds raised PLEASE SEE ATTACHED SHEET #1

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
   (1) Name of court NO HIGHER STATE COURT AVAILABLE FOR REVIEW
   (2) Result
   (3) Date of result and citation, if known
   (4) Grounds raised

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:
   (1) Name of court UNITED STATES SUPREME COURT
   (2) Result DENIAL OF CERTIORARI
   (3) Date of result and citation, if known DECEMBER 1996 CITATION UNKNOWN
   (4) Grounds raised EIGHTH AMENDMENT VIOLATIONS IN THREE PARTICULARS

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court SEVENTH JUDICIAL CIRCUIT COURT
    (2) Nature of proceeding SOUTH DAKOTA HABEAS CORPUS
    (3) Grounds raised PLEASE SEE ATTACHMENT #2

11

AO 241 (Rev. 5/85) PET ON UNDER 28 USC § 2254 FOR WR OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District SOUTH DAKOTA, SOUTHERN DIVISION	
Name CHARLES RUSSELL RHINES	Prisoner No 28414	Case No. CIV00-4032

Place of Confinement: SOUTH DAKOTA STATE PENITENTIARY, SIOUX FALLS, MINNEHAHA COUNTY, SOUTH DAKOTA

FILED
FEB 22 2000
CLERK

Name of Petitioner (include name under which convicted): CHARLES RUSSELL RHINES

Name of Respondent (authorized person having custody of petitioner): v. DOUGLAS WEBER, WARDEN: SOUTH DAKOTA STATE PENITENTIARY

The Attorney General of the State of SOUTH DAKOTA: MARK BARNETT

PETITION

1. Name and location of court which entered the judgment of conviction under attack SEVENTH JUDICIAL CIRCUIT COURT, RAPID CITY, PENNINGTON COUNTY, SOUTH DAKOTA

2. Date of judgment of conviction JANUARY 2 , 1 3

3. Length of sentence DEATH AND TEN YEARS

4. Nature of offense involved (all counts) FIRST DEGREE MURDER AND THIRD DEGREE BURGLARY

5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐
   If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

9. If you did appeal, answer the following:
   (a) Name of court SOUTH DAKOTA SUPREME COURT
   (b) Result CONVICTION AND SENTENCE AFFIRMED
   (c) Date of result and citation, if known MAY 16, 1996:STATE V. RHINES: 1996 SD 55; 548 N.W. 2d 415
   (d) Grounds raised PLEASE SEE ATTACHED SHEET #1

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:
      (1) Name of court NO HIGHER STATE COURT AVAILABLE FOR REVIEW
      (2) Result
      (3) Date of result and citation, if known
      (4) Grounds raised

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:
      (1) Name of court UNITED STATES SUPREME COURT
      (2) Result DENIAL OF CERTIORARI
      (3) Date of result and citation, if known DECEMBER 1996 CITATION UNKNOWN
      (4) Grounds raised EIGHTH AMENDMENT VIOLATIONS IN THREE PARTICULARS

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:
    (a) (1) Name of court SEVENTH JUDICIAL CIRCUIT COURT
    (2) Nature of proceeding SOUTH DAKOTA HABEAS CORPUS
    (3) Grounds raised PLEASE SEE ATTACHMENT #2

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes☒ No☐

(5) Result DENIAL OF WRIT

(6) Date of result OCTOBER 1998 (APPEALED TO SD S.CT.: DENIED FEB 2000)

(b) As to any second petition, application or motion give the same information:

(1) Name of court

(2) Nature of proceeding

(3) Grounds raised

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes☐ No☐

(5) Result

(6) Date of result

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes☒ No☐
(2) Second petition, etc. Yes☐ No☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12 State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corp proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise a grounds which you may have other than those listed if you have exhausted you state court remedies with respect to ther However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base yo allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege fact The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of tl nature of the charge and the consequences of the plea.
(b) Conviction obtained by use of coerced confession
(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
(e) Conviction obtained by a violation of the privilege against self-incrimination.
(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorab to the defendant.
(g) Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
(i) Denial of effective assistance of counsel.
(h) Denial of right of appeal.

A. Ground one: DENIAL OF FAIR AND IMPARTIAL HEARING UNDER SIXTH AMENDMENT TO US CONSTITUTION

Supporting FACTS (state *briefly* without citing cases or law) ON OCTOBER 18, 1995 A LOCAL TE VISION STATION AIRED A NEWS PROGRAM FEATURING A SD S.CT. JUSTICE AT- TENDING/PARTICIPATING IN APPEAL OF CONVICTION/SENTENCE. THIS S.CT. JUSTICE WAS APPOINTED TO COURT SUBSEQUENT TO APPELLANT'S TRIAL AND HAD PRESIDED OVER APPELLANT'S TRIAL.
SD S.CT. JUSTICE JOHN K. KONENKAMP APPARENTLY PARTICIPATED IN THE APPEAL PROCESS OF A CASE HE PRESIDED OVER AS A TRIAL COURT JUDGE.

B. Ground two: DENIAL OF FAIR AND IMPARTIAL TRIAL CONTRARY TO THE SIXTH AMENDMENT TO THE US CONSTITUTION

Supporting FACTS (state *briefly* without citing cases or law) DURING VOIR DIRE, PROSECUTION EXCLUDED VENIREPERSON DIANNE STAEFFLER BECAUSE SHE HAD RESERVATIONS ABOUT THE DEATH PENALTY. COURT EXCLUDED VENIREPERSON FOR HER VIEWS ON CAPITAL PUNISHMENT, EVEN THOUGH VENIREPERSON HAD STATED SHOULD COULD CONSIDER THE DEATH PENALTY AS A POSSIBLE PUNISHMENT.

C. Ground three: DENIAL OF FAIR AND IMPARTIAL TRIAL. SIXTH AMENDMENT TO THE US CONSTITUTION.

Supporting FACTS (state *briefly* without citing cases or law) WITNESS GLEN WISHARD COMMITTEI PERJURY TESTIFYING TO APPELLANT'S "STATE OF MIND" SEVERAL HOURS AFTEI COMMISSION OF OFFENSE. PROSECUTOR KNEW WITNESS WISHARD WAS TESTIFY- ING FALSELY AND DID NOTHING TO CORRECT TESTIMONY.

D. Ground four: denial of sixth amendment. denial of effective assistance OF COUNSEL.

Supporting FACTS (state *briefly* without citing cases or law) APPELLANT WAS APPOINTED THREE (3) ATTORNEY'S TO REPRESENT HIM AT TRIAL. ATTORNEY #1-WAYNE F. GILE HAS SUBSEQUENTLY BEEN DISBARRED FOR ILLEGAL ACTIVITIES PRIOR TO AND DURING PERIOD OF REPRESENTATION. #2- WAS PRIMARILY A CIVIL LITIGATOR WITH LIMITED CRIMINAL TRIAL EXPERIENCE. #3-WAS OVER-WORKED PUBLIC DEF ENDER WHO HAD TO SHOULDER MOST OF WORK LOAD - IN ADDITION TO BEING APPOINTED AS APPELLANT'S "INVESTIGATOR."

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: I ATTEMPTED TO HAVE PREVIOUS ATTORNEY, MICHAEL W. HANSON, PRESENT GROUND 1 BUT HE DID NOT INVESTIGATE THE LEADS I GAVE HIM. APPARENTLY HE BELIEVED IT WOULD BE T NO AVAIL TO ATTACK SD S.CT. ON IT'S OWN GROUND, SO TO SPEAK. I CONCUR.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein.
(a) At preliminary hearing NO PRELIMINARY HEARING: GRAND JURY INDICTMENT

(b) At arraignment and plea 1) WAYNE F. GILBERT, CURRENT ADDRESS UNKNOWN. 2) JOSEPH M. BUTLER, 818 ST. JOSEPH ST. RAPID CITY, SD. 3) MICHAEL STONEFIELD, PENN- INGTON COUNTY PUBLIC DEFENDERS OFFICE, RAPID CITY, SD

field: PENNINGTON COUNTY PUBLIC DEFENDERS OFFICE, RAPID CITY, SD 57701
(c) At trial SAME AS (b)

(d) At sentencing Same as (b)

(e) On appeal WAYNE F. GILBERT & MICHAEL STONEFIELD

(f) In any post-conviction proceeding MICHAEL W. HANSON, 505 W. 9th St. Sioux Falls,

(g) On appeal from any adverse ruling in a post-conviction proceeding Same as in (f)

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and th same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒
(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to b served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on
FEBRUARY 17, 2000
(date)

Signature of Petitioner
CHARLES R. RHINES, PRO SE

GROUND FIVE: SIXTH AMENDMENT TO THE US CONSTITUTION. DENIAL OF FAIR AND IMPARTIAL JURY.

SUPPORTING FACTS: SOUTH DAKOTA CAPITAL PUNISHMENT JURIES ARE SELECTED TO SEAT A TRIBUNAL ORGANIZED TO RETURN A VERDICT OF GUILTY IN THE GUILT PHASE OF CAPITAL TRIALS AND DEATH IN THE PENALTY PHASE THROUGH "DEATH QUALIFICATION." THIS CAPITAL TRIAL/SENTENCING JURY WAS ORGANIZED TO RETURN THE VERDICTS REQUESTED BY THE PROSECUTION BY WEEDING OUT ALL VENIREPERSONS FROM THE JURY POOL WHO HAD THE SLIGHTEST HESITANCY CONCERNING THE USE OF THE DEATH PENALTY.

ATTACHMENT #'

GROUNDS RAISED ON DIRECT APPEAL.

1) TRIAL COURT ERRED BY NOT SUPPRESSING STATEMENTS

2) TRIAL COURT ERRED IN EXCUSING VENIREPERSON FOR CAUSE.

3) CALCULATED AND SELECTIVE USE OF PEREMPTORY CHALLENGES CREATED A JURY DEVOID OF THOSE WITH OPPOSITION TO CAPITAL PUNISHMENT.

4) CONSTITUTIONALLITY OF SOUTH DAKOTA CAPITAL PUNISHMENT STATUTE.

5) TRIAL COURT ERRED BY ALLOWING VICTIM IMPACT TESTIMONY

6) EVIDENCE WAS INSUFFICIENT TO SUSTAIN VERDICT OF TORTURE UNDER AGGRAVATING CIRCUMSTANCE § 23A-27A-1(6).

7) TRIAL COURT ERRED IN IT'S INSTRUCTIONS REGARDING AGGRAVATING CIRCUMSTANCE § 23A-27A-1(6).

8) TRIAL COURT ERRED IN IT'S INSTRUCTIONS REGARDING AGGRAVATING CIRCUMSTANCE 23A-27A-1(3).

9) THE JURY'S CONSIDERATION OF ONE OR MORE INVALID AGGRAVATING CIRCUMSTANCES REQUIRES REVERSAL OF THE DEATH SENTENCE.

10) TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE STATEMENTS MADE BY APPELLANT CONCERNING THE JUSTICE SYSTEM.

11) TRIAL COURT ERRED IN REFUSING TO APPOINT A FORENSIC COMMUNICATION EXPERT.

12) TRIAL COURT ERRED BY REFUSING SEVERAL OF APPELLANT'S JURY INSTRUCTIONS.

13) APPELLANT'S DEATH SENTENCE WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR OTHER ARBITRARY FACTORS.

14) THIS COURT (SD S.Ct.) SHOULD IT"S STATUTORILY REQUIRED PROPORTIONALLITY REVIEW USING A BROAD POOL OF "SIMILAR CASES." AND SHOULD ALLOW PRESENTATION AT A LATER TIME OF FURTHER EVIDENCE ON PROPORTIONALLITY.

ATTACHMENT #2
PAGE 1

GROUNDS RAISED ON SOUTH DAKOTA HABEAS CORPUS REVIEW.

1) THAT DURING TRIAL PREPARATION, TRIAL AND APPELLATE PHASES. APPELLANT HAD INEFFECTIVE ASSISTANCE OF COUNSEL.

2) THAT A CONSTITUTIONAL LAW VIOLATION OCCURRED WHEN TRIAL COURT REFUSED TO SUPPRESS APPELLANT'S STATEMENT'S OF JUNE 19 AND JUNE 21, 1992.

3) THAT THE TRIAL COURT VIOLATED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN EXCUSING VENIREPERSON DIANE STAEFFLER.

4) CALCULATED AND SELECTIVE USE OF PEREMPTORY CHALLANGES CLEARED THE JURY OF ANY VENIREPERSON WITH RESERVATIONS ABOUT CAPITAL PUNISHMENT.

5) THAT THE TRIAL COURT'S REFUSAL TO ANSWER THE QUESTIONS SUBMITTED BY THE JURY CONCERNING THE "REALITY OF LIFE WITHOUT PAROLE" VIOLATED DUE PROCESS.

6) THE SOUTH DAKOTA CAPITAL PUNISHMENT STATUTES VIOLATE DUE PROCESS AND EQUAL PROTECTION OFTHE LAW.

7) APPELLANT WAS DENIED DUE PROCESS BY THE TRIAL COURT ALLOWING VICTIM IMPACT TESTIMONY.

8) EVIDENCE WAS INSUFFICIENT TO SUSTAIN VERDICT OF TORTURE UNDER AGGRAVATING CIRCUMSTANCE 23A-27A-1(6) RESULTING IN VIOLATION OF DUE PROCESS OF LAW.

9) TRIAL COURT ERRED IN IT'S INSTRUCTIONS REGARDING AGGRAVATING CIRCUMSTANCE 23A-27A-1(6), DEPRAVITY OF MIND, RESULTing IN A VIOLATION OF DUE PROCESS.

10) TRIAL COURT ERRED IN IT'S INSTRUCTIONS REGARDING AGGRAVATING CIRCUMSTANCE 23A-27A-1(3), RESULTING IN A VIOLATION OF DUE PROCESS.

11) THE JURY'S CONSIDERATION OF ONE OR MORE INVALID AGGRAVATING CIRCUMSTANCE VIOLATED DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

12) THE TRIAL COURT VIOLATED DUE PROCESS IN REFUSING TO APPOINT A FORENSIC COMMUNICATION S EXPERT.

13) TRIAL COURT VIOLATED DUE PROCESS BY REFUSING SEVERAL OF APPELLANT'S JURY INSTRUCTIONS.

14) THE DEATH SENTENCE WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR OTHER ARBITRARY FACTORS SO AS TO CONSTITUTE A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

15) THE IMPOSITION OF A DEATH SENTENCE IN THIS CASE WAS DISPROPORTIONATE TO ALL OTHER HOMICIDE CASES IN SOUTH DAKOTA SO AS TO VIOLATE EQUAL PROTECTION OF THE LAW AND DUE PROCESS.

16) THE USE OF STATE VS. MOELLER BY THE STATE OF SOUTH DAKOTA, TO SHOW THAT THE DEATH SENTENCE WAS NOT DISPROPORTIONATE VIOLATED DUE PROCESS.

17) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN HE ASKED THE MEDICAL EXAMINER IF THE VICTIM WAS TIED UP BEFORE OR AFTER DEATH, WHEN THE PROSECUTOR KNEW IN ADVANCE THE MEDICAL EXAMINER COULD NOT DETERMINE WHEN THE VICTIM WAS TIED UP, RESULTING IN A VIOLATION OF DUE PROCESS OF THE APPELLANT'S RIGHTS.

18) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF THE APPELLANT'S DUE PROCESS RIGHTS BY NEVER COMING OUT AND SAYING HE WOULD INTRODUCE A VICTIM IMPACT STATEMENT UNTIL THE DAY OF THE PENALTY PHASE OF THE TRIAL STARTED.

19) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS WHEN HE MADE REFERENCE TO THE APPELLANT "GUTTING".THE VICTIM, WHEN THE EVIdence CLEARLY SHOWED NO SUCH THING HAD OCCURRED.

20) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS, BY INTRODUCING INTO EVIDENCE ENLARGED PHOTOGRAPHS OF THE VICTIM, IN WHICH THE STAB WOUNDS WERE DISPROPORTIONATELY ENLARGED TO REFLECT THE ALLEGED ATTEMPT TO "GUT" OR "DEGUT" THE VICTIM.

STATE OF SOUTH DAKOTA,)
)SS.
COUNTY OF PENNINGTON.)

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

File No. 93-81

STATE OF SOUTH DAKOTA,

Plaintiff,

vs.

CHARLES RUSSELL RHINES,
DOB: 7/11/56
PCN #: 1674495

Defendant.

JUDGMENT

On the 29th day of January, 1993, at the hour of 9:00 o'clock a.m., the Defendant, CHARLES RUSSELL RHINES, being present personally and being represented by and through his attorneys, Joseph Butler, Wayne Gilbert, and Mike Stonefield, each of Rapid City; the State being represented by State's Attorney, Dennis A. Groff, and Deputy State's Attorney, Mark A. Vargo; the Defendant having previously been arraigned on an Indictment alleging the offense of COUNT I: FIRST DEGREE MURDER (FELONY), committed on or about March 8, 1992, in violation of SDCL 22-16-4; the Defendant having previously entered a plea of Not Guilty to COUNT I of the Indictment as charged; a jury trial having been held before this Court commencing the 4th day of January, 1993, with respect to said offense; the jury having returned its verdict of Guilty of the offense of COUNT I: FIRST DEGREE MURDER (FELONY) on January 22, 1993; a pre-sentence hearing having been held before the jury commencing on the 25th day of January, 1993; the jury having returned its unanimous verdict with a finding of three aggravating circumstances and a

recommendation that the the death sentence be imposed, and the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the judgment and sentence of this Court is that you, CHARLES RUSSELL RHINES, upon your conviction for the crime of FIRST DEGREE MURDER (FELONY), shall suffer the death penalty, said penalty to be inflicted within the walls of the South Dakota State Penitentiary in the manner prescribed by the statutes of the State of South Dakota, and it is further

ORDERED, that the week of August 22, 1993, be and the same is hereby appointed as the week within which this death sentence shall be executed, and it is further

ORDERED, that the Defendant, CHARLES RUSSELL RHINES, is hereby remanded to the custody and control of the Sheriff of Pennington County, South Dakota, to be by him delivered to the Warden of the South Dakota State Penitentiary at Sioux Falls, South Dakota, within ten (10) days from the date hereof for the execution of the sentence for the offense of MURDER IN THE FIRST DEGREE, to be held by him pending the final determination of the appeals in this matter, which are automatic, and said sentence to be executed upon final determination of said appeals.

Dated this 29th day of January, 1993.

BY THE COURT:

The Honorable John K. Konenkamp
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:

/s/Bonnie Fitzgerald
Clerk of Courts

By Deputy

(SEAL)

Pennington County, S.D.
FILED
IN THE CIRCUIT COURT
JAN 29 1993
Bonnie Fitzgerald, Clerk
By Deputy

NOTICE OF RIGHT TO APPEAL

You, CHARLES RUSSELL RHINES, are hereby notified that pursuant to SDCL 23A-27A-9, that the Clerk of Courts of the Seventh Judicial Circuit, within ten (10) days after receiving the transcript of this trial, shall transmit the entire record and transcript of the Supreme Court together with a Notice prepared by the Clerk and a report prepared by the trial judge. The Notice shall set forth the title and docket number of this case, your name and the names and addresses of your attorneys, a narrative statement of the Judgment, the offense, and the punishment prescribed.

You are further notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said Clerk.

BEST AVAILABLE COPY

(2)

Supreme Court, U.S.
FILED
SEP 2 - 2004
OFFICE OF THE CLERK

No. 03-9046

In The Supreme Court of the United States

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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LAWRENCE E. LONG
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for Respondent
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Petition For Certiorari Filed February 19, 2004
Certiorari Granted June 28, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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ORDER	DOCUMENT	DATE FILED
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3.	Motion to Toll Time	05/15/00
4.	State's Response to Petitioner's Motion to Toll Time	06/01/00
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7.	First Amended Petition For Writ of Habeas Corpus and Statement of Exhaustion	11/20/00
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PETITION UNDER 28 USC § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

(Filed Feb. 22, 2000)

United States District Court	District SOUTH DAKOTA, SOUTHERN DIVISION	
Name CHARLES RUSSELL RHINES	Prisoner No. 28414	Case No. CIV-00-4032
Place of Confinement SOUTH DAKOTA STATE PENITENTIARY SIOUX FALLS, MINNEHAHA COUNTY SOUTH DAKOTA		
Name of Petitioner (include name under which convicted) CHARLES RUSSELL RHINES	Name of Respondent (authorized person having custody of petitioner V. DOUGLAS WEBER WARDEN: SOUTH DAKOTA STATE PENITENTIARY	
The Attorney General of the State of: SOUTH DAKOTA: MARK BARNETT		

PETITION

1. Name and location of court which entered the judgment of conviction under attack SEVENTH JUDICIAL CIRCUIT COURT, RAPID CITY, PENNINGTON COUNTY, SOUTH DAKOTA
2. Date of judgment of conviction JANUARY 2 , 1 3
3. Length of sentence DEATH AND TEN YEARS
4. Nature of offense involved (all counts) FIRST DEGREE MURDER AND THIRD DEGREE BURGLARY

5. What was your plea? (Check one)
   (a) Not Guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details:

---

6. If you pleaded not guilty, what kind of trial did you have? (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☐ No ☒

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

9. If you did appeal, answer the following:

   (a) Name of court SOUTH DAKOTA SUPREME COURT

   (b) Result CONVICTION AND SENTENCE AFFIRMED

   (c) Date of result and citation, if known MAY 16, 1996: STATE V. RHINES: 1996 SD 55; 548 N.W. 2D 415

   (d) Grounds raised PLEASE SEE ATTACHED SHEET #1

   (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

      (1) Name of court NO HIGHER STATE COURT AVAILABLE FOR REVIEW

      (2) Result _____

      (3) Date of result and citation, if known _____

      (4) Grounds raised _____

   (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

      (1) Name of court UNITED STATES SUPREME COURT

      (2) Result DENIAL OF CERTIORARI

      (3) Date of result and citation, if known DECEMBER 1996 CITATION UNKNOWN

      (4) Grounds raised EIGHTH AMENDMENT VIOLATIONS IN THREE PARTICULARS

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?
    Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

   (a) (1) Name of court SEVENTH JUDICIAL CIRCUIT COURT

      (2) Nature of proceeding SOUTH DAKOTA HABEAS CORPUS

      (3) Grounds raised PLEASE SEE ATTACHMENT #2

      (4) Did you receive an evidentiary hearing on your petition, application or motion?
      Yes ☒ No ☐

      (5) Result DENIAL OF WRIT

      (6) Date of result OCTOBER 1998 (APPEALED TO SD S.CT.: DENIED FEB 2000)

   (b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☐

(5) Result _____

(6) Date of result _____

(c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?
(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☐ No ☐

(d) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: _____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date:

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise all grounds which you may have other than those listed if you have exhausted you [sic] state

court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any of these grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

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D. Ground four: denial of sixth amendment, denial of effective assistance OF COUNSEL.

Supporting FACTS (state *briefly* without citing cases or law) APPELLANT WAS APPOINTED THREE (3) ATTORNEY'S [sic] TO REPRESENT HIM AT TRIAL. ATTORNEY #1 – WAYNE F. GILE HAS SUBSEQUENTLY BEEN DISBARRED FOR ILLEGAL ACTIVITIES PRIOR TO AND DURING PERIOD OF REPRESENTATION. #2 – WAS PRIMARILY A CIVIL LITIGATOR WITH LIMITED CRIMINAL TRIAL EXPERIENCE. #3 – WAS OVER-WORKED PUBLIC DEFENDER WHO HAD TO SHOULDER MOST OF WORK LOAD – IN ADDITION TO BEING APPOINTED AS APPELLANT'S "INVESTIGATOR."

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: I ATTEMPTED TO HAVE PREVIOUS ATTORNEY, MICHAEL W. HANSON, PRESENT GROUND 1 BUT HE DID NOT INVESTIGATE THE LEADS I GAVE HIM. APPARENTLY HE BELIEVED IT WOULD BE TO NO AVAIL TO ATTACK SD S.CT. ON IT'S [sic] OWN GROUND, SO TO SPEAK. I CONCUR.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?
Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attached herein:

(a) At preliminary hearing NO PRELIMINARY HEARING: GRAND JURY INDICTMENT

(b) At arraignment and plea 1) WAYNE F. GILBERT, CURRENT ADDRESS UNKNOWN. 2) JOSEPH M. BUTLER, 818 ST. JOSEPH ST. RAPID CITY, SD. 3) MICHAEL STONEFIELD, PENNINGTON COUNTY PUBLIC DEFENDERS OFFICE, RAPID CITY, SD field: PENNINGTON COUNTY PUBLIC DEFENDERS OFFICE, RAPID CITY, SD 57701

(c) at trial SAME AS (b)

(d) At sentencing SAME AS (b)

(e) On appeal WAYNE F. GILBERT & MICHAEL STONEFIELD

(f) In any post-conviction proceeding MICHAEL W. HANSON, 505 W. 9th St. Sioux Falls, SD

(g) On appeal from any adverse ruling in a post-conviction proceeding Same as in (f)

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

_____
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

FEBRUARY 17, 2000
(date)

/s/ Charles Rhines
Signature of Petitioner
CHARLES R. RHINES, PRO SE

GROUND FIVE: SIXTH AMENDMENT TO THE US CONSTITUTION. DENIAL OF FAIR AND IMPARTIAL JURY.

SUPPORTING FACTS: SOUTH DAKOTA CAPITAL PUNISHMENT JURIES ARE SELECTED TO SEAT A TRIBUNAL ORGANIZED TO RETURN A VERDICT OF GUILTY IN THE GUILT PHASE OF CAPITAL TRIALS AND DEATH IN THE PENALTY PHASE THROUGH "DEATH QUALIFICATION." THIS CAPITAL TRIAL/ SENTENCING JURY WAS ORGANIZED TO RETURN THE VERDICTS REQUESTED BY THE PROSECUTION BY WEEDING OUT ALL VENIREPERSONS FROM THE JURY POOL WHO HAD THE SLIGHTEST HESITANCY CONCERNING THE USE OF THE DEATH PENALTY.

ATTACHMENT #1

GROUNDS RAISED ON DIRECT APPEAL.

1) TRIAL COURT ERRED BY NOT SUPPRESSING STATEMENTS

2) TRIAL COURT ERRED IN EXCUSING VERNIREPERSON FOR CAUSE.

3) CALCULATED AND SELECTIVE USE OF PEREMPTORY CHALLENGES CREATED A JURY DEVOID OF THOSE WITH OPPOSITION TO CAPITAL PUNISHMENT.

4) CONSTITUTIONALLITY [sic] OF SOUTH DAKOTA CAPITAL PUNISHMENT STATUTE.

5) TRIAL COURT ERRED BY ALLOWING VICTIM IMPACT TESTIMONY

6) EVIDENCE WAS INSUFFICIENT TO SUSTAIN VERDICT OF TORTURE UNDER AGGRAVATING CIRCUMSTANCE § 23A-27A-1(6).

7) TRIAL COURT ERRED IN IT'S [sic] INSTRUCTIONS REGARDING AGGRAVATING CIRCUMSTANCE § 23A-27A-1(6).

8) TRIAL COURT ERRED IN IT'S [sic] INSTRUCTIONS REGARDING CIRCUMSTANCE 23A-27A-1(3).

9) THE JURY'S CONSIDERATION OF ONE OR MORE INVALID AGGRAVATING CIRCUMSTANCES REQURIES REVERSAL OF THE DEATH SENTENCE.

10) TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE STATEMENTS MADE BY APPELLANT CONCERNING THE JUSTICE SYSTEM.

11) TRIAL COURT ERRED IN REFUSING TO APPOINT A FORENSIC COMMUNICATION EXPERT.

12) TRIAL COURT ERRED BY REFUSING SEVERAL OF APPELLANT'S JURY INSTRUCTIONS.

13) APPELLANT'S DEATH SENTENCE WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR OTHER ARBITRARY FACTORS.

14) THIS COURT (SD S.Ct.) SHOULD [sic] IT"S STATUTORILY REQUIRED PROPORTIONALLITY [sic] REVIEW USING A BROAD POOL OF "SIMILAR CASES," AND SHOULD ALLOW PRESENTATION AT A LATER TIME OF FURTHER EVIDENCE ON PROPORTIONALLITY [sic].

ATTACHMENT #2

PAGE 1

GROUNDS RAISED ON SOUTH DAKOTA HABEAS CORPUS REVIEW.

1) THAT DURING TRIAL PREPARATION, TRIAL AND APPELLATE PHASES, APPELLANT HAD INEFFECTIVE ASSISTANCE OF COUNSEL.

2) THAT A CONSTITUTIONAL LAW VIOLATION OCCURRED WHEN TRIAL COURT REFUSED TO SUPPRESS APPELLANT'S STATEMENT'S [sic] OF JUNE 19 AND JUNE 21, 1992.

3) THAT THE TRIAL COURT VIOLATED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN EXCUSING VENIREPERSON DIANE STAEFFLER.

4) CALCULATED AND SELECTIVE USE OF PEREMPTORY [sic] CHALLENGES CLEARED THE

ER-
JURY OF ANY VENIREPERSON WITH F
VATIONS ABOUT CAPITAL PUNISHMENT.

AN-
5) THAT THE TRIAL COURT'S REFUSAL T HE
SWER THE QUESTIONS SUBMITTED B IFE
JURY CONCERNING THE "REALITY OF S.
WITHOUT PAROLE" VIOLATED DUE PROC

ENT
6) THE SOUTH DAKOTA CAPITAL PUNISH ND
STATUTES VIOLATE DUE PROCESS
EQUAL PROTECTION OF THE LAW.

BY
7) APPELLANT WAS DENIED DUE PROCE ACT
THE TRIAL COURT ALLOWING VICTIM I
TESTIMONY.

AIN
8) EVIDENCE WAS INSUFFICIENT TO SU ING
VERDICT OF TORTURE UNDER AGGRAV IN
CIRCUMSTANCE 23A-27A-1(6) RESULTI
VIOLATION OF DUE PROCESS OF LAW.

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9) TRIAL COURT ERRED IN IT'S [sic] INS UM-
TIONS REGARDING AGGRAVATING CI ND,
STANCE 23A-27A-1(6), DEPRAVITY OF ESS.
RESULTING IN A VIOLATION OF DUE PR

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10) TRIAL COURT ERRED IN IT'S [sic] INS UM-
TIONS REGARDING AGGRAVATING CI A
STANCE 23A-27A-1(3), RESULTING
VIOLATION OF DUE PROCESS.

ORE
11) THE JURY'S CONSIDERATION OF ONE OR [sic]
INVALID AGGRAVATING CIRCUMSTANC RO-
VIOLATED DUE PROCESS AND EQUAI
TECTION OF THE LAW.

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12) THE TRIAL COURT VIOLATED DUE PROC MU-
REFUSING TO APPOINT A FORENSIC C
NICATONS EXPERT.

13) TRIAL COURT VIOLATED DUE PROCESS BY REFUSING SEVERAL OF APPELLANT'S JURY INSTRUCTIONS.

14) THE DEATH SENTENCE WAS IMPOSED UNDER THE INFLUENCE OF PASSION, PREJUDICE OR OTHER ARBITRARY FACTORS SO AS TO CONSTITUTE A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

15) THE IMPOSITION OF A DEATH SENTENCE IN THIS CASE WAS DISPROPORTIONATE TO ALL OTHER HOMICIDE CASES IN SOUTH DAKOTA SO AS TO VIOLATE EQUAL PROTECTION OF THE LAW AND DUE PROCESS.

16) THE USE OF *STATE VS. MOELLER* BY THE STATE OF SOUTH DAKOTA, TO SHOW THAT THE DEATH SENTENCE WAS NOT DISPROPORTIONATE VIOLATED DUE PROCESS.

17) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN HE ASKED THE MEDICAL EXAMINER IF THE VICTIM WAS TIED UP BEFORE OR AFTER DEATH, WHEN THE PROSECUTOR KNEW IN ADVANCE THE MEDICAL EXAMINER COULD NOT DETERMINE WHEN THE VICTIM WAS TIED UP, RESULTING IN A VIOLATION OF DUE PROCESS OF THE APPELLANT'S RIGHTS.

18) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF THE APPELLANT'S DUE PROCESS RIGHTS BY NEVER COMING OUT AND SAYING HE WOULD INTRODUCE A VICTIM IMPACT STATEMENT UNTIL THE DAY OF THE PENALTY PHASE OF THE TRIAL STARTED.

19) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS WHEN HE MADE REFERENCE TO THE APPELLANT "GUTTING." THE VICTIM, WHEN THE EVIDENCE CLEARLY SHOWED NO SUCH THING HAD OCCURRED.

20) THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN VIOLATION OF APPELLANT'S DUE PROCESS RIGHTS, BY INTRODUCING INTO EVIDENCE ENLARGED PHOTOGRAPHS OF THE VICTIM, IN WHICH THE STAB WOUNDS WERE DISPROPORTIONATELY ENLARGED TO REFLECT THE ALLEGED ATTEMPT TO "GUT" OR "DEGUT" THE VICTIM.

STATE OF SOUTH DAKOTA,)
) SS IN CIRCUIT COURT
COUNTY OF PENNINGTON,)

STATE OF SOUTH DAKOTA,)
Plaintiff,) SEVENTH JUDICIAL CIRCUIT
vs.)
CHARLES RUSSELL RHINES,) File No. 93-81
DOB: 7/11/56) JUDGMENT
PCN #: 1674495) (Filed Jan. 29, 1993)
Defendant.)

On the 29th day of January, 1993, at the hour of 9:00 o'clock a.m., the Defendant, CHARLES RUSSELL RHINES, being present personally and being represented by and through his attorneys, Joseph Butler, Wayne Gilbert, and Mike Stonefield, each of Rapid City; the State being represented by State's Attorney, Dennis A. Groff,

and Deputy State's Attorney, Mark A. Vargo; the Defendant having previously been arraigned on an indictment alleging the offense of COUNT I: FIRST DEGREE MURDER (FELONY), committed on or about March 8, 1992, in violation of SDCL 22-16-4; the Defendant having previously entered a plea of Not Guilty to COUNT I of the Indictment as charged; a jury trial having been held before this Court commencing the 4th day of January, 1993, with respect to said offense; the jury having returned its verdict of Guilty of the offense of COUNT I: FIRST DEGREE MURDER (FELONY) on January 22, 1993; a pre-sentence hearing having been held before the jury commencing on the 25th day of January, 1993; the jury having returned its unanimous verdict with a finding of three aggravating circumstances and a recommendation that the death sentence be imposed, and the Defendant having been fully advised of his rights, and the Court having affixed this day as the date for pronouncing sentence; the Defendant having been asked whether there was any legal cause to show why a judgment should not be pronounced against him in accordance with the law and no cause being shown; it is hereby

ORDERED AND ADJUDGED, and the judgment and sentence of this Court is that you, CHARLES RUSSELL RHINES, upon your conviction for the crime of FIRST DEGREE MURDER (FELONY), shall suffer the death penalty, said penalty to be inflicted within the walls of the South Dakota State Penitentiary in the manner prescribed by the statutes of the State of South Dakota, and it is further ORDERED, that the week of August 22, 1993, be and the same is hereby appointed as the week within which this death sentence shall be executed, and it is further

ORDERED, that the Defendant, CHARLES RUSSELL RHINES, is hereby remanded to the custody and control of the Sheriff of Bennington County, South Dakota, to be by him delivered to the Warden of the South Dakota State Penitentiary at Sioux Falls, South Dakota, within ten (10) days from the date hereof for the execution of the sentence for the offense of MURDER IN THE FIRST DEGREE, to be held by him pending the final determination of the appeals in this matter, which are automatic, and said sentence to be executed upon final determination of said appeals.

Dated this 29th day of January, 1993.

BY THE COURT:

/s/ John K. Konenkamp
The Honorable
John K. Konenkamp
Circuit Court Judge
Seventh Judicial Circuit

ATTEST:

/s/ Bonnie Fitzgerald
Clerk of Courts

By J Bock
Deputy

NOTICE OF RIGHT TO APPEAL

You, CHARLES RUSSELL RHINES, are hereby notified that pursuant to SDCL 23A-27A-9, that the Clerk of Courts of the Seventh Judicial Circuit, within ten (10) days after receiving the transcript of this trial, shall transmit the entire record and transcript of the Supreme Court together with a Notice prepared by the Clerk and a report prepared by the trial judge. The Notice shall set

forth the title and docket number of this case, your name and the names and addresses of your attorneys, a narrative statement of the Judgment, the offense, and the punishment prescribed.

You are further notified that you have a right to appeal as provided for by SDCL 23A-32-15, which you must exercise by serving a written notice of appeal upon the Attorney General of the State of South Dakota and the State's Attorney of Pennington County and by filing a copy of the same, together with proof of such service with the Clerk of this Court within Thirty (30) days from the date that this Judgment is filed with said Clerk.

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	)	Civ. 00-5020-KES PROCEDURAL ORDER (Filed Apr. 5, 2000)

The court has appointed Michael Butler and John Schlimgen to represent petitioner in this matter. In order to get the progression of this case on track, it is hereby

ORDERED that the South Dakota Attorney General file a notice of appearance with the court within ten days from the entry of this order.

IT IS FURTHER ORDERED that the Clerk of the Court has petitioner's criminal and habeas files from the state court. The Clerk shall provide two copies to petitioner's counsel.

IT IS FURTHER ORDERED that counsel should make every effort to obtain a complete copy of the record on appeal and the files of petitioner's prior attorneys within thirty days of the date counsel is appointed. Although the court does not usually assist directly in obtaining the record, counsel should report any delays to the court so that the court is fully aware of any obstacles encountered.

IT IS FURTHER ORDERED that the following procedure will generally govern the briefing and resolution of this habeas corpus proceeding:

1. ***Status Conference*:** A status conference will be held on Friday, April 7, 2000, at 9 a.m. at the federal building in Sioux Falls, South Dakota. This status conference shall include only the court, petitioner, and petitioner's counsel. These parties should be prepared to discuss petitioner's pending discovery requests and the application for extraordinary writ. The parties should also be prepared to discuss any statute of limitations, exhaustion of state remedies, or other issues, if any, which may affect the filing of the Amended Petition or efficient resolution of this matter. The court will also address the procedure to be followed in this case which is outlined below.

2. ***Amended Petition*:** After the status conference is held, the court will enter a scheduling order to govern the filing of the Amended Petition in this case. Because petitioner commenced this proceeding after April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") applies to this case. *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). Under 28 U.S.C. § 2244(d)(1), as amended by the AEDPA, an application for habeas corpus relief must be filed within one year "of the date on which the judgment became final by the conclusion of direct review."

The Amended Petition shall include all known claims of constitutional error or deprivation entitling petitioner to habeas relief. *See* Rule 2(c), 28 U.S.C. foll. § 2254. Petitioner is advised that he may be presumed to have deliberately waived his right to complain of any constitutional error or deprivation not raised in the Amended Petition.

See Rule 9(b), 28 U.S.C. foll. § 2254; *see also McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (abuse of the writ doctrine bars review of claims that could have been raised in a previous habeas petition absent a showing of cause and prejudice or a fundamental miscarriage of justice). Petitioner is further advised that pursuant to 28 U.S.C. § 2244, he may not file a second or successive petition in this court without prior authorization from the Eighth Circuit. Under § 2244(b)(3)(C), the grounds for obtaining such authorization are extremely limited. Consequently, it is incumbent upon petitioner to raise all known claims in the Amended Petition.

The Amended Petition shall set forth, in a clear and concise fashion, the legal and factual basis for each ground for relief. The factual basis shall include full citations to the appropriate portions of the record. Additionally, petitioner shall include in the Amended Petition a "Statement of Exhaustion," specifically asserting when and where each ground for relief was raised in the state courts. *See Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

3. *Procedural Status of Claims*: Respondent shall file an Answer Re: Procedural Status of Claims, which addresses the procedural status of all claims raised in the Amended Petition, specifically identifying which claims, if any, respondent contends are unexhausted or procedurally barred from review on the merits. Petitioner shall respond to the answer by filing a traverse. The traverse shall be a comprehensive responsive pleading which addresses issues of exhaustion and procedural default, and shall present alternative arguments of cause and prejudice or a fundamental miscarriage of justice, when applicable. Requests for an evidentiary hearing

regarding cause and prejudice, or miscarriage of justice, shall be incorporated into petitioner's traverse. Respondent may file a reply, if he wishes. Finally, petitioner may file a sur-reply that shall be limited to arguments concerning cause and prejudice or a fundamental miscarriage of justice, should respondent address those issues in a reply. The court intends this briefing on the procedural status of the claims to be the sole briefing on all issues of exhaustion and procedural default necessary for the court to determine which claims will be reviewed on the merits.

4. *Merits of Claims*: After the procedural status of the claims raised in the Amended Petition is fully briefed, the court will determine which claims will be reviewed on the merits. A scheduling order will be issued that will set forth when petitioner shall file a Memorandum of Law Re: Merits of Claims, when respondent shall file a Response Re: Merits of Claims, and when Petitioner shall file a Reply. Requests for an evidentiary hearing shall be incorporated into petitioner's Memorandum of Law. The petition will then be in a posture for the court to resolve the merits of the appropriate claims in this habeas corpus proceeding.

IT IS FURTHER ORDERED that the original and one copy of all documents shall be filed in this case.

IT IS FURTHER ORDERED that the Clerk of the Court shall ensure that counsel has been provided with copies of everything in petitioner's file.

IT IS FURTHER ORDERED that a copy of the Petition for Writ of Habeas Corpus and this Order be served by the Clerk of the Court upon Respondent Douglas Weber and upon Mark Barnett, South Dakota Attorney

General, by certified mail pursuant to Rule 4, Rules Governing Section 2254 Cases.

IT IS FURTHER ORDERED that the Clerk of the Court forward a copy of this order to Petitioner.

IT IS FURTHER ORDERED that the Clerk of the Court forward a copy of this order to the Clerk of the South Dakota Supreme Court.

Dated April 5, 2000.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT of SOUTH DAKOTA

WESTERN DIVISION

* *

CHARLES RUSSELL RHINES, Petitioner,	]
vs.	] MOTION TO TOLL TIME
DOUGLAS WEBER, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, RESPONDENT.	] (Filed May 15, 2000)] CIV NO. 00-5020-KES

* *

COMES NOW THE PETITIONER, *CHARLES RUSSELL RHINES*, IN THE above entitled action, requesting the Untied States District Court for the Western Division of the District of South Dakota to grant this *MOTION TO TOLL TIME* in order to toll the time between the appointment and subsequent disqualification of appointed counsel Michael Butler and substitute counsel being appointed as the Petitioner's counsel of record.

1] In the context of the Antiterrorist and Effective Death Penalty act [AEDPA], the disqualification of Michael Butler does indeed pose and present a sunstantial [sic] hardship for the Petitioner in that as of April 17, 2000 the Petitioner had remaining a total of eighty-nine [89] days in which to file his final, amended petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and the AEDPA.

2] Counselor Butler had nearly a month [27 days] to become familiar with the Petitioner and Petitioner's case. During this period the Petitioner conferred with counselor Butler several times and laid the foundations

for his amended petition. Petitioner will now have to spend an equal amount of time conferring with alternate or substitute counsel and start the process again.

3] The AEDPA restricts the Petitioner to a maximum of one [1] year for presenting his final, amended petition to the Court. This time limitation extends from the point at which the Petitioner's South Dakota direct appeal became final by the affirmation of the conviction and sentence by the South Dakota Supreme Court.

4] If the Petitioner's elapsed time as contemplated by the AEDPA is computed and the time taken for South Dakota habeas corpus review is tolled, then as of May 10, 2000 the Petitioner has a total of 66 days remaining to file his Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and the AEDPA.

5] Petitioner's conviction and sentence became final for the purposes of the AEDPA on May 15, 1996.

6] The Petitioner filed for a writ of habeas corpus in the South Dakota Seventh Judicial Circuit Court on December 8, 1996, there-by tolling the running of the time pursuant to the AEDPA.

7] The South Dakota Supreme Court denied the Petitioner's writ of habeas corpus on February 8, 2000.

8] May 15, 1996 through December 8, 1996 equals 207 days elapsed since the Petitioner's case became final.

9] February 8, 2000 through May 10, 2000 equals an additional 92 days elapsed since the Petitioner's case became final for purposes of the "Year" envisioned by the AEDPA. This is 299 days elapsed.

10] A "year" is 365 days. Subtracting 299 days from that amount leaves 66 days for the Petitioner to research,

confer with his attorney's, read through the copious materials from discovery, draft and redraft a petition that will suffice and withstand judicial scrutiny.

11] Attorney Michael Butler was appointed to represent the Petitioner on March 20, 2000. He was subsequently disqualified as the Petitioner's counsel on April 17, 2000. This is a period of some twenty-seven [27] days.

12] The Honorable Karen E. Schreier, presiding, stated in her memorandum disqualifying Michael Butler that an alternate or substitute counsel would be appointed to represent the Petitioner within seven [7] days. [As of April 17, 2000].

13] Paragraphs #11 and #12 above account for some thirty-four [34] days of "dead time" for which the Petitioner is held accountable but for which no action of the Petitioner was the cause. Petitioner is being penalized for the actions of the State of South Dakota.

14] The petitioner did not specifically request the appointment of Michael Butler as his counsel because the Petitioner was aware that Michael Butler had testified in the Petitioner's South Dakota habeas corpus action as an "expert witness."

15] Petitioner believes that counsel Butler should have informed the District Court of his involvement in the Petitioner's case at the time of his appointment, for consideration by the District Court for disqualification prior to the April 7, 2000 status hearing. Petitioner believes that counselor Butler should have been aware that his prior involvement in the Petitioner's South Dakota habeas corpus action could be grounds for a conflict of interests, and acted accordingly within his professions' tenets of ethics.

16] The Petitioner has acted in good faith in his o Se filings before the Court and should not be per lized for the failure of appointed counsel to disclose the District Court prior involvement in the Petit ner's South Dakota habeas corpus litigation and/or c sul- tations with the Petitioner's trial counsel on irect review.

17] The Petitioner was not aware that his trial co nsels had consulted with Michael Butler on any issu or issues regarding the Petitioner's appeal of his nvic- tion and/or sentence. These consultations a not noted on any documentation that the Petition has seen nor were these consultations disclosed the Petitioner by his trial counsels.

18] The Petitioner has become aware as of April 2 2000 that the South Dakota Attorney General has gued in a similar case in South Dakota Circuit Cou that a Deputy Attorney General *SHOULD NOT E RE-MOVED* from a case simply because the Dep y At- torney General testified in that case and ay be called to again testify in that case.

19] The Petitioner believes the South Dakota A orney General argued that Michael Butler should e re- moved from the Petitioner's case simply to friv lously expend the Petitioner's extremely limited filin time. The South Dakota Attorney General has arg d the same issue in wholly inconsistent manners in highly similar circumstances and cases simply to gain an unfair advantadge [sic] over the Petitioner, rather than to insure a fair trial procedure.

20] The Petitioner argues that the State of South akota should not be rewarded, nor should the Petitioner be penalized by the use of frivolous, inconsisten argu- ments by the State of South Dakota concern ng the issue of an attorney testifying in a case an being

subject to recall as a witness in a subsequent action in the same case.

21] The Petitioner requests the District Court toll the time which attorney Michael Butler was appointed to represent the Petitioner. This was March 20, 2000 through April 17, 2000, a period of twenty-seven [27] days.

22] The Petitioner also requests the District Court to toll the time taken by the Court to appoint alternate or substitute counsel to replace Michael Butler

23] The Petitioner further requests that the same amount of time afforded to Michael Butler to become familiarized with Petitioner's case be tolled for the alternate counsel to become familiar with Petitioner's case and to confer with the Petitioner.

/s/ Charles R. Rhines
Charles R. Rhines, PETITIONER, PRO SE
SOUTH DAKOTA STATE PENITENTIARY
1600 NORTH DRIVE
SIOUX FALLS, SOUTH DAKOTA 57117
SIGNED THIS 11th DAY OF MAY, 2000.

/s/ Charles R. Rhines
CHARLES R. RHINES, PRO SE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, v. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. No. 00-5020-KES STATE'S RESPONSE TO PETITIONER'S MOTION TO TOLL TIME (Filed Jun. 02, 2000)

Respondent above-named hereby appears in this matter and files this response to Petitioner's "Motion to Toll Time," as required by the Court in its Order dated May 16, 2000.

The premise of Petitioner's Motion to Toll Time seems to be that the statute of limitations contained at 28 U.S.C. § 2244(d) would prohibit him from filing an amended petition if it is not done within eighty-nine days of April 17, 2000. Petitioner then proceeds to lay out a number of specific time periods. For reference, 28 U.S.C. § 2244(d) provides as follows:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

From this text, it is apparent that the premise of Petitioner's motion is faulty. For purposes of the motion, the Respondent hereby concedes that a "statute of limitation" ceases to run after a case is commenced. In the specific instance of this statute of limitation, the Eighth Circuit has specifically held that it ceases to run when Petitioner delivers his habeas corpus petition to the prison authorities for mailing to the United States District Court. The petition, document 1 on the Court's docket, is dated February 17, 2000, and was filed in this Court on February 22, 2000. Under the prison mailbox rule, therefore, no time after (presumably) February 17, 2000, will be counted

against the Petitioner in any event. In effect, the filing of the original pro se petition, if it was timely, allows petitioner to pursue his habeas corpus relief in this action, no matter how many times his petition is amended. It was timely, and the action was properly commenced, if he delivered the papers to the prison authorities for mailing within the statute of limitations. *Nichols v. Bowersox*, 172 F.3d 1068, 1073-77 (8th Cir. 1999).

For general reference of the Court, even though we concede that Petitioner's petition was timely filed, and may be amended, if the court so allows, without regard to the limitations period, we would set out the following timetable: Petitioner's conviction becomes final when the United States Supreme Court denies certiorari from his direct appeal, or when the ninety days to ask for certiorari expires. *Smith v. Bowersox*, 159 F.3d 345, 347 (8th Cir. 1998). In this case, the South Dakota Supreme Court decided Petitioner's direct appeal on May 15, 1996. A timely petition for rehearing was filed, and that was denied on June 28, 1996. This gave Petitioner until September 26, 1996, within which to file his petition for certiorari, and he did so on that date. The petition was denied on December 2, 1996, *Rhines v. South Dakota*, 519 U.S. 1013 (1996). Thus, Petitioner's conviction became final for purposes of AEDPA on that date. As the Eighth Circuit noted in *Bowersox*, 172 F.3d at 1071, no time before April 24, 1996, counts against any petitioner in any event. Since, however, Petitioner's conviction became final on December 2, 1996, the time between finality of his conviction and filing of his state habeas corpus petition does count against him. The state habeas corpus petition was filed on December 5, 1996. This means that only two days (December 3 and 4, 1996) elapsed for purposes of the

federal habeas corpus statute of limitations at that time. The petition then remained pending until decided by the South Dakota Supreme Court. *See Peterson v. Gammon*, 200 F.3d 1202, 1204 (8th Cir. 2000); *Mills v. Norris*, 187 F.3d 881, 883-84 (8th Cir. 1999). This date was February 9, 2000. *Rhines v. Weber*, 2000 S.D. 19, 608 N.W.2d 303. The time for filing of certiorari from a state habeas determination is not excluded. *Ott v. Johnson*, 192 F.3d 510, 512-13 (5th Cir. 1999), *cert. denied*, 120 S.Ct. 1834 (2000). Thus, in addition to the two days from December of 1996, Petitioner also had a period of either six days or twelve days in February 2000 that ran against the statute of limitations. Petitioner has had a maximum of fourteen days (more likely eight days) that have run against the statute of limitations in section 2244.

Since Petitioner is in no danger of losing his right to file for federal habeas corpus relief, there is no reason to toll the time of the statute of limitations. In addition, Petitioner has cited no authority that this Court has jurisdiction to toll this statute. The very fact that Petitioner's petition has been on file since either February 17 or February 22 of this year means that the time on the statute is not now running, at least as to the present case. It may be true that Petitioner would be in danger if the present case were dismissed. That matter can, however, be dealt with as appropriate. The filing of an amended petition or petitions will be a part of the same case, and will not endanger Petitioner's request for relief on their merits. *See* Fed. R. Civ. P. 15(c) (2).

WHEREFORE, Respondent hereby requests that Petitioner's motion to toll time be denied because it is unnecessary, only eight (or fourteen) days having run on the section 2244 one-year statute of limitations.

Dated this 1st day of June, 2000.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

/s/ Craig M. Eichstadt
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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. No. 00-5020-KES ORDER (Filed Jun. 29, 2000)

Petitioner Charles Russell Rhines filed a pro se "Motion to Toll Time" requesting tolling in the above entitled action. The South Dakota Attorney General's Office resisted petitioner's motion. Counsel for petitioner responded, agreeing with the State that filing of the original petition tolls the statute of limitation and therefore, petitioner's motion is unnecessary. Based on the foregoing, it is hereby

ORDERED that petitioner's motion to toll time (Docket 49) is denied.

Dated June 29, 2000.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. 00-5020-KES AMENDED PROCEDURAL ORDER (Filed Oct. 18, 2000)

On October 13, 2000, Petitioner filed "Motion for Extension of Time to File Amended Petition." The court has reviewed the motion, and it is hereby

ORDERED that Petitioner shall have until **November 20, 2000**, to file an Amended Petition for Writ of Habeas Corpus to include every known constitutional error or deprivation entitling Petitioner to habeas relief. *See* Rule 2(c), 28 U.S.C. foll. § 2254. Petitioner is advised that he may be presumed to have deliberately waived his right to complain of any constitutional error deprivation not raised in the Amended Petition. *See* Rule 9(b), 28 U.S.C. foll. § 2254; *see also McCleskey v. Zant*, 499 U.S. 467, 498 (1991) (abuse of the writ doctrine bars review of claims that could have been raised in a previous habeas petition absent a showing of cause and prejudice or a fundamental miscarriage of justice). Petitioner is further advised that pursuant to 28 U.S.C. § 2244, he may not file a second or successive petition in this court without prior authorization from the Eighth Circuit. Under § 2254(b)(3)(C), the grounds for obtaining such authorization are extremely limited. Consequently, it is incumbent

upon Petitioner to raise all known claims in the Amended Petition.

The Amended Petition shall set forth, in a clear and concise fashion, the legal and factual basis for each ground for relief. The factual basis shall include full citations to the appropriate portions of the record. *Additionally, Petitioner shall include in the Amended Petition a "Statement of Exhaustion," specifically asserting when and where each ground for relief was raised in the state courts. See Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998).

IT IS FURTHER ORDERED that on or before **January 19, 2001**, Respondent shall file an Answer Re: Procedural Status of Claims, which addresses the procedural status of all claims raised in the petition, specifically identifying which claims, if any, Respondent contends are unexhausted or procedurally barred from review on the merits.

IT IS FURTHER ORDERED that on or before **March 2, 2001**, Petitioner shall file a Traverse. The Traverse shall be a comprehensive responsive pleading which addresses issues of exhaustion and procedural default, and shall present alternative arguments of cause and prejudice or a fundamental miscarriage of justice, when applicable. Requests for an evidentiary hearing regarding cause and prejudice, or miscarriage of justice, shall be incorporated into Petitioner's Traverse.

IT IS FURTHER ORDERED that if Respondent files a Reply, it shall be done no later than **April 2, 2001**, after the Traverse is filed.

IT IS FURTHER ORDERED that if Petitioner files a Sur-reply, he shall do so no later than **April 16, 2001**,

after the Reply is filed. *The Sur-reply shall be limited to arguments concerning cause and prejudice or a fundamental miscarriage of justice.*

IT IS FURTHER ORDERED that after the procedural status of the claims raised in the Amended Petition are fully briefed, the court will determine which claims will be reviewed on the merits. A scheduling order will be issued that will set forth when Petitioner shall file a Memorandum of Law Re: Merits of Claims, when Respondents shall file a Response Re: Merits of Claims, and when Petitioner shall file a Reply. Requests for an evidentiary hearing shall be incorporated into Petitioner's Memorandum of Law. The Petition will then be in a posture for the court to resolve the merits of the appropriate claims in this habeas corpus proceeding.

Dated October 18, 2000.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Plaintiff, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Defendant.	*	CIV. 00-5020-KES **FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS AND STATEMENT OF EXHAUSTION** (Filed Nov. 20, 2000)

Charles Russell Rhines, for his First Amended Petition For Writ of Habeas Corpus and Statement of Exhaustion, and consistent with the Court's Procedural Order dated May 17, 2000, and the Rules Governing Section 2254 Cases in the United States District Court and Appendix thereto, states as follows:

1. Petitioner Charles Russell Rhines is imprisoned in the South Dakota State Penitentiary under a Judgment of Conviction entered in Circuit Court, Seventh Judicial Circuit, County of Pennington, State of South Dakota.

2. The date of the Judgment of Conviction was January 29, 1993.

3. The sentence imposed on Charles Russell Rhines is death by lethal injection.

4. The offenses on which Petitioner was convicted are first degree murder and third degree burglary.

5. Petitioner Charles Russell Rhines entered a plea of not guilty to the offenses charged at his preliminary hearing. Before his trial, Petitioner Rhines, through counsel, offered to plead guilty to first degree murder in exchange for a life sentence, which offer was spurned by the prosecuting attorney.

6. The conviction and sentence was obtained through jury trial.

7. Petitioner Charles Russell Rhines did not testify at trial.

8. Petitioner Charles Russell Rhines did appeal from the Judgment of Conviction.

9. The appeal from the Judgment of Conviction was to the Supreme Court of the State of South Dakota.

10. The decision of the Supreme Court of South Dakota on direct appeal is reported at *State v. Rhines*, 548 N.W.2d 415 (S.D. 1996).

11. The Judgment of Conviction and the death sentence were upheld by the South Dakota Supreme Court, notwithstanding the finding of the South Dakota Supreme Court that one of the aggravating factors relied upon by the jury to impose the death sentence was unconstitutional.

12. Petitioner Charles Russell Rhines filed an Application For Writ of Habeas Corpus in state court. Prior to this case, Petitioner Charles Russell Rhines has never filed a federal habeas corpus action to challenge his conviction.

13. Petitioner Charles Russell Rhines filed his state court Application for Writ of Habeas Corpus in Circuit Court, Seventh Judicial Circuit, State of South Dakota, Pennington County as *Rhines v. Weber*, civil file number 96-1070. The Court held an evidentiary hearing on the Petition, and issued Findings of Fact, Conclusions of Law and an Order on November 16, 1998, denying relief on the Petition. Petitioner Charles Russell Rhines appealed to the Supreme Court of South Dakota, which affirmed the lower court in a decision reported at *Rites v. Weber*, 608 N.W.2d 303 (S.D. 2000).

14. A concise statement, as contemplated in the model form for use in Applications for Habeas Corpus under 28 U.S.C. § 2254, of each ground on which claim for relief is made, including a Statement of Exhaustion as required in the Court's Procedural Order dated May 17, 2000, follows:

GROUND ONE:

The Fifth and Fourteenth Amendment rights of Mr. Rhines were infringed through admission and use at trial of Mr. Rhines' statements to law enforcement officers on June 19 and 21, 1992.

Supporting Facts:

Following the arrest of Mr. Rhines in Seattle on June 19, 1992, Mr. Rhines was questioned over the course of several hours on June 19 and June 21, 1992, by two law enforcement officers from the State of South Dakota. During the course of the interrogation, Mr. Rhines made incriminating statements that were used prominently by the State in the guilt and penalty phases of the trial. The law enforcement officers failed to give adequate warnings

as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), and its progeny, in that:

A. At no time was Mr. Rhines told that he could terminate the questioning at any time he wished;

B. At no time was Mr. Rhines told that he had the right not only to have an attorney present with him during the questioning, but also to request an attorney to be present at any point during questioning;

C. At no time was Mr. Rhines told that if he could not afford an attorney, one *would* or *must* be appointed for him;

D. At no time was Mr. Rhines told that by agreeing to answer questions, he would be waiving *Miranda* rights;

E. The statements of Mr. Rhines were involuntary in that they were procured following a statement by a South Dakota law enforcement officer implying that Mr. Rhines would not receive the death penalty.

Statement of Exhaustion:

The admission of the statements taken from Mr. Rhines on June 19 and 21, 1992, were challenged at the trial court level through Defendant's first Motion To Suppress, (Settled Record "SR" at 68-72) Supplement to First Motion to Suppress (SR at 88-95), Suppression Hearing of December 1, 1992, and an objection at trial before admission of the statements (Trial Transcript "TT" at 2415-16). These issues were raised on direct appeal (Appellant's Brief dated June 23 1994 at pp. 15-27). These

issues further were raised in the First Amended Application For Writ of Habeas Corpus (First Amended Application at p. 4, B.), and on appeal in the state habeas corpus action (Appellant's Brief dated January 20, 1999, at p. 48).

GROUND TWO:

The rights of Mr. Rhines to due process, an impartial jury, and to equal protection of the law were violated by exclusion for cause of two prospective jurors: A) Diane Staeffler and B) Jack Meyer.

Supporting Facts:

During jury selection, the State used its peremptory challenges to exclude those prospective jurors who had expressed scruples, reservations or concerns about implementation of the death penalty (TT at 430, 514, 607, 810, 1109, 1298, 1349). Running short on peremptory challenges, the State sought and the trial court allowed removal for cause of prospective juror Diane Staeffler (TT at 1618-1639). Diane Staeffler, while indicating hesitation with implementing the death penalty, indicated a willingness to follow the instructions of the Court in that regard. The Court twice denied challenges for cause by the State, yet continued to allow the State to interrogate Staeffler in an increasingly hostile fashion. The Court then granted the State's motion to excuse Ms. Staeffler for cause. The handling of prospective juror Jack Meyer was substantially similar. (TT at 332).

Statement of Exhaustion:

During the questioning of Diane Staeffler, counsel for Rhines repeatedly objected to the handling of the questioning and the motions to excuse Ms. Staeffler for cause (TT

at 1631-1639). Rhines raised a challenge to the exclusion of Diane Staeffler for cause on his direct appeal (Appellant's Brief dated June 23, 1994, at pp. 28-41). On direct appeal, this issue was raised with reference to due process rights and to the rights secured under the cases of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed. 2d 339 (1976); and *Gray v. Mississippi*, 41 U.S. 648, 107 S.Ct. 2045, 95 L.Ed. 2d 622 (1987). Mr. Rhines again raised this issue in his First Amended Application For Writ of Habeas Corpus (First Amended Application at p. 4.C.) and on appeal to the South Dakota Supreme Court from the denial of the Writ of Habeas Corpus in state court. (Appellant's Brief dated January 20, 1999 at p. 49.) The handling of juror Jack Meyer has not been separately exhausted in state court.

GROUND THREE:

The rights of Mr. Rhines to due process, an impartial jury, and equal protection of the law were violated by the State's calculated and selective use of peremptory challenges to exclude jurors with scruples or reservations about imposition of the death penalty.

Supporting Facts:

The State openly pursued a strategy to use peremptory challenges to remove jurors who demonstrated scruples, concerns or reservations about the death penalty, but who were not unequivocally opposed to imposing the death penalty in all cases. (TT at 430, 514, 607, 810, 1109, 129, 1349, 1701-02). With respect to its strategy regarding peremptory challenges, the prosecuting attorney acknowledged:

> . . . the State has worked out a strategy to specifically avoid the next juror, that is juror Larson, the next person you'll see. Our whole strategy in waiving was to avoid the possibility of having her come on without any pre-emts [sic] left when she stated on her questionnaire that it would be very difficult to impose the death penalty, that was our greatest fear and that is the reason we waived.

TT at 1701-02. The State's strategy and "greatest fear" of jurors who may have reservations about imposition of the death penalty violated the Fifth, Sixth, Eighth and Fourteenth Amendment rights and protections secured to Mr. Rhines by decisions like *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct.1770, 20 L.Ed.2d 776 (1968).

Statement of Exhaustion:

Counsel for Mr. Rhines objected during jury selection as to the tactics of the State. Counsel for Mr. Rhines also moved to have a new jury impaneled for purposes of the penalty phase. (TT at 2567-2570). Mr. Rhines raised on the direct appeal the challenge to the State's calculated and selective use of peremptory challenges, including citation to the cornerstone *Witherspoon* case. (Appellant's Brief dated June 23, 1994, at 41-45). That challenge was renewed in the First Amended Application For Writ of Habeas Corpus (First Amended Application at p. 4.D.) The issue was also raised again on appeal in the state habeas corpus action. (Appellant's Brief dated January 20, 1999, at p. 49).

GROUND FOUR:

Mr. Rhines' constitutional protection against ex post facto laws the Eighth Amendment right against cruel and unusual punishment, and rights to due process and equal protection of the law were violated by use of victim impact testimony during the penalty phase.

Supporting Facts:

The murder on which the conviction is based occurred on March 8, 1992. On July 1, 1992, an amendment to the South Dakota death penalty statutes became effective to permit victim impact testimony during the penalty phase. Citing the protection against ex post facto laws and other authority, Mr. Rhines filed a motion to exclude any such evidence or testimony, and a supplement to that motion (SR at 115-116, 141-142). The trial court reserved ruling until the day of the penalty phase proceeding, January 25, 1993, when it chose to admit such evidence. (SR at 427, TT at 2563-2567). The victim impact testimony, which was read by the victim's mother and was the last testimony to the jury during the penalty phase, was not rebuttal to any presentation by the witnesses for Mr. Rhines and was not otherwise admissible evidence in the penalty phase.

Statement of Exhaustion:

Rhines challenged the admission of the victim impact testimony at trial, both by motion and during trial. (SR at 115-16, 141-142, Motion Hearing Transcript at 12-31, 54-57, TT at 2563-2567). Rhines raised a challenge to the allowance of the victim impact statement on direct appeal. (Appellant's Brief dated June 23, 1994, at 53-70.) In the course of that appeal, Rhines referred to the ex post facto

prohibition and cited to cases involving constitutional challenges including *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Booth v. Maryland*, 42 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989). In his First Amended Petition for Writ of Habeas Corpus, Rhines again raised the challenge to the admission of the victim impact evidence. (First Amended Application at p. 4.G.). That challenge was likewise stated to the South Dakota Supreme Court on appeal in the state habeas corpus action. (Appellant's Brief dated January 20, 1999, at p. 50).

GROUND FIVE:

The due process, equal protection and Eighth Amendment rights of Mr. Rhines to be free from cruel and unusual punishment were infringed through imposition of the death penalty by a jury that considered an unconstitutional "depravity of mind" aggravating factor.

During the penalty phase, the Court instructed the jury under SDCL 23A-27A-1(6) on "depravity of mind" as an aggravating factor on which the jury could base imposition of a death sentence. The trial court gave the jury instructions on "depravity of mind." (SR 456-57). The State argued for imposition of the death penalty based on Mr. Rhines' alleged "depravity of mind." The jury specifically found as an aggravating factor underlying imposition of the death penalty that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved "depravity of mind" by Mr. Rhines. (SR at 481). The Supreme Court of South Dakota appropriately found that the "depravity of mind" element was unconstitutionally

vague. *State v. Rhines*, 548 N.W.2d 415, 447-449 (S.D. 1996). Nevertheless, the South Dakota Supreme Court upheld the imposition of the death sentence, despite the unconstitutional factor (and jury instructions regarding that factor) being considered by the jury. The South Dakota Supreme Court failed to undertake an appropriate harmless error analysis.

Statement of Exhaustion:

Mr. Rhines objected at trial to the giving of the instructions on "depravity of mind" (TT at 2639-2640). Mr. Rhines raised challenges to the giving of instructions on "depravity of mind" on direct appeal (Appellant's Brief dated June 23, 1994, at 77-86). Mr. Rhines raised this issue again, including the issue of the lack of harmless review analysis by the South Dakota Supreme Court, in his First Amended Petition, and on appeal of the State Habeas case to the South Dakota Supreme Court. (Appellant's Brief at pp. 37-48). During the presentation on direct appeal, Mr. Rhines cited cases involving constitutional issues, such as *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); and *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). On the appeal from the State Habeas Corpus ruling, Mr. Rhines cited federal constitutional law cases including *Zant v. Stephens*, 462 U.S. 862, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983); *Clemons v. Mississippi*, 494 U.S. 738, 108 L.Ed.2d 725, 110 S.Ct. 1441 (1990): *Sochor v. Florida*, 504 U.S. 527, 119 L.Ed.2d 326, 112 S.Ct. 2114 (1992); *Stringer v. Black*, 503 U.S. 222, 117 L.Ed.2d 367, 112 S.Ct. 1130 (1992); and *Chapman v. California*, 386 U.S. 18, 17 L.Ed.2d765, 875 S.Ct., 824 (1967).

GROUND SIX:

Mr. Rhines' rights to due process, equal protection and to be free from cruel and unusual punishment were violated on account of the unconstitutionality of the South Dakota capital punishment statutes in several respects.

Supporting Facts:

Mr. Rhines was given a sentence of death under the South Dakota capital punishment scheme that existed under SDCL 23A-27A as of January of 1993. The South Dakota death penalty statutes were unconstitutional in the following respects.

A. The listing of aggravating circumstances under SDCL 23A-27A-1 does not adequately limit "death eligible" defendants or offenses;

B. The South Dakota capital punishment statutes contain insufficient standards to guide the sentencer's discretion in determining whether a particular defendant will or will not receive a death sentence;

C. The South Dakota death penalty statutes mandate a sentence of death upon a jury recommendation, unconstitutionally foreclosing discretion of a trial judge in sentencing;

D. The South Dakota death penalty statutes require judicial proportionality review, without providing adequate guidance or a means of collecting information on death penalty cases;

E. The South Dakota death penalty statutes in SDCL 23A-27A-1, mandate that the court

"shall consider, or shall include in instructions to the jury" death penalty provisions "in all cases for which the death penalty may be authorized," which is all Class A felonies under SDCL 22-6-1.

Statement of Exhaustion.

Such challenges to the constitutionality of the South Dakota Capital punishment statutes were raised in Pre-Trial Motions. (SR at 96-103). Such matters were argued by Mr. Rhines at the trial court level (Motion Hearing at 12-31). On direct appeal from the conviction, Mr. Rhines raised such challenges. (Appellant's Brief dated June 23, 1994 at pp. 45-53). Such issues were raised again in the state habeas corpus petition and to the South Dakota Supreme Court on appeal therefrom. (Appellant's Brief dated January 20, 1999, at pp. 49-50). Issue Six E. was not directly raised previously by Rhines, but is futile to pursue in state court in light of the South Dakota Supreme Court ruling in *State v. Moeller*, 616 N.W.2d 424, 463 (S.D. 2000).

GROUND SEVEN:

The Fifth Amendment right to due process, the Eighth Amendment rights to be free from cruel and unusual punishment and the equal protection rights of Mr. Rhines were violated by improper jury instructions during the penalty phase.

Supporting Facts.

The following errors occurred in the jury instructions during the penalty phase of Mr. Rhines' trial:

A. The trial court instructed on "depravity of mind" as a circumstance for imposing the death penalty, which was later held to be unconstitutional.

B. The trial court erred in its instruction on the meaning of SDCL 23A-27A-1(3);

C. The trial court erred in refusing the giving of a proposed instruction by Charles Raines regarding the procedure for the jury to follow in arriving at their sentence (SR at 445, Proposed Instruction 8);

D The trial court refused to give Rhines' proposed instruction 9 regarding the presumption of innocence of aggravating circumstances (SR at 446);

E. The trial court refused to give proposed instruction 11 regarding the meaning of the death sentence and life imprisonment (SR at 448).

F. The trial court failed to comprehend the reasons for the jury note and failed to deal properly with instructing the jury in light of its jury note.

In the midst of deliberation on the penalty phase, the jury sent a note to the Court indicating confusion over the meaning of life without parole, what petitioner's living conditions and privileges might be if he received life in prison, and other such things. The jury thus indicated an uncertainty over the instructions from the Court, which could have and should have been resolved through Rhines' proposed instructions.

Statement of Exhaustion:

The above-listed challenges to the jury instructions were presented to the trial court and presented on direct appeal (Appellant's Brief dated June 23, 1994 at 86-92, 109-116). In that discussion, Rhines referred to constitutional rights and cited constitutional authority such as *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct 2809, 49 L.Ed.2d 859 (1976), and other such authority. In the state habeas corpus case, Mr. Rhines again presented such arguments in the First Amended Petition and to the South Dakota Supreme Court on appeal. (Appellant's Brief dated January 20, 1999, at 57).

GROUND EIGHT:

There was constitutionally insufficient evidence to support a finding of certain aggravating circumstances.

Supporting Facts:

Based on the instructions of the trial court, the jury found that the offense involved "torture" and was perpetrated to obtain money. Given the way those terms should apply in the context of the death penalty and in the context of sufficiency of the evidence under the Fifth Amendment, Eighth Amendment, and Equal Protection Clause, there was insufficient evidence to find either of those aggravating circumstances beyond a reasonable doubt.

Statement of Exhaustion.

Rhines raised the above-stated grounds on his direct appeal (Appellant Brief dated June 23, 1994 at 86-93, 70-77). These grounds were again stated in the First

Amended Petition and on appeal to the South Dakota Supreme Court in the state habeas action. (Appellant's Brief dated January 20, 1999 at 50-51).

GROUND NINE

Mr. Rhines' Fifth Amendment right to due process of law and the Sixth Amendment right to assistance of counsel were violated through the ineffective assistance of his trial counsel.

Supporting Facts:

Mr. Rhines was represented at trial level by Wayne Gilbert and Joseph Butler. The Court also appointed public defender Michael Stonefield as the investigator. The ineffective assistance of trial counsel manifested itself in multiple ways including:

A. The absence of any true mitigation investigation on behalf of Rhines;

B. The tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines, including failure to contact or call available witnesses – including, but not limited to, John Fousek, James Mighell and Connie Royer – who would have provided helpful testimony for Mr. Rhines in the penalty phase;

C. The failure to present to the jury during the penalty phase any information about Rhines' willingness to accept culpability, whether through information on Rhines' effort to plead guilty to first degree murder or through Rhines' right to give an allocution to the jury at the penalty phase;

D. The failure of the defense team to make a motion in limine and objections to prevent presentation of information on the homosexuality of Charles Rhines, and instead publicizing to the jury Rhines' homosexuality during voir dire;

E. The inappropriate and ineffective handling of the jury note raising questions during penalty phase deliberations about Mr. Rhines personally and the meaning of life imprisonment;

F. The need for the appointed investigator, Michael Stonefield, to take over much of the defense work in the case due to problems with the defense team;

G. The ineffective representation of Mr. Rhines by one attorney who was suffering from depression and later disbarred for theft, a second attorney who openly and repeated told the jury that he supported the death penalty, and a third attorney who was supposed to be the "investigator" and ended up doing the majority of the work.

H. The failure to catch and correct erroneous and false, yet highly prejudicial, testimony from Glen Wishard.

I. The failure to request the hiring of, consult with, or hire a mitigation consultant or expert.

J. The failure of trial counsel to register objections to keep out irrelevant yet prejudicial testimony such as Rhines having access to a gun, a statement by Rhines at the victim's funeral.

Statement of Exhaustion:

Petitioner believes that the issues listed as A through G were raised in the First Amended Application For Writ of Habeas Corpus and in turn on the appeal to the South Dakota Supreme Court in the state habeas corpus action. (Appellant's Brief dated January 20, 1999 at 9, 17-37.) In his presentation of these claims, Rhines relied upon the seminal constitutional case in this realm of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

GROUND TEN:

The rights of Mr. Rhines to due process, equal protection under law, and to be free from cruel and unusual punishment were violated by the Court's errors in its proportionality review and review of whether imposition of the death penalty was under passion, prejudice or other arbitrary factors.

Supporting Facts:

Under SDCL 23A-27A-12 and consistent with constitutional protections under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, the Supreme Court of South Dakota was obliged to and undertook an analysis of: 1) Whether the death sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, 2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and 3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In conducting its review, the Supreme Court of South Dakota neglected information indicative of imposition of the death

sentence based on passion, prejudice or arbitrary factors. The Supreme Court of South Dakota also took an unconstitutionally narrow view of "similar cases" in conducting its proportionality analysis.

Statement of Exhaustion:

Mr. Rhines presented these issues on direct appeal to the Supreme Court of South Dakota. (Appellant's Brief dated June 23, 1994 at 113-122). These issues also were addressed in Appellant's Proportionality Review Brief dated January 18, 1995, and Appellant's Proportionality Review Reply Brief dated March 3, 1995. The Supreme Court of South Dakota was aware of the constitutional implications of such a review in citing *Gregg v. Georgia*, 428 US 153, 96 S.Ct. 2809, 47 L.Ed.2d 859 (1976) in its discussion on the topic. *See State v. Rhines*, 548 N.W.2d 415, 455 (S.D. 1996).

GROUND ELEVEN:

The due process rights and right to adequate assistance of counsel of Rhines were violated by the refusal of the trial court to appoint a forensic communication expert.

Supporting Facts:

Before trial, Rhines, who is indigent, moved for appointment of a forensic communication expert for the purpose of designing, pre-testing, conducting and analyzing a community attitude survey and preparation of a jury questionnaire. The motion was made both for venue considerations and trial preparation. SR at 38-58. The cost of such work likely would have ranged between $4,000 and $7,000. SR at 38-58. Part of the purposes of such a survey

would be to instruct counsel on dealing with the homosexuality of Mr. Rhines. (Appellant's Brief dated June 23, 1994 at 107 (quoting 11/3/92 letter from counsel to Judge Konnenkamp)). The trial court denied the request.

Statement of Exhaustion:

Rhines, in his appeal to the Supreme Court of South Dakota, raised this issue. (Appellant's Brief dated June 23, 1994 at 106-109). The Supreme Court of South Dakota granted no relief in this regard.

GROUND TWELVE:

The due process and equal protection rights of Mr. Rhines were violated by various acts of prosecutorial misconduct.

Supporting Grounds:

The prosecutor committed prosecutorial misconduct in maintaining that the victim's hands were tied prior to the fatal wound, when the evidence was to the effect that they were tied afterwards; in referring to the victim being "gutted" in the assault when there was no such evidence; using and arguing from false and erroneous testimony from witness Glen Wishard; and using the improper tactic of eliminating all jurors with any misgivings about imposition of the death penalty.

Statement of Exhaustion:

The illicit tactic of the prosecution in eliminating the claim all jurors with scruples or misgivings about the death penalty overlaps Ground Two above and the claim

was exhausted for the reasons set forth above in Ground Two. The other instances of prosecutorial misconduct have not been raised previously but fall within *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963), and its progeny.

GROUND THIRTEEN:

The Fifth, Sixth and Fourteenth Amendment rights of Mr. Rhines were violated as a result of the failure to have Mr. Rhines present or allow him to participate in the handling of the jury note and response to the jury note.

Supporting Grounds:

In the midst of jury deliberations, the jury delivered to the Court a note setting forth myriad questions regarding the meaning and nature of life imprisonment, among other things. Mr. Rhines was not made aware of the note at the time, nor included in the hearing to resolve how to respond to the note.

Statement of Exhaustion:

While issues surrounding the handling of the jury note have been raised on direct appeal and in the habeas corpus case, this precise claim has not been raised previously.

15. Petitioner Charles Russell Rhines believes that each of the above-stated grounds have been exhausted either on direct appeal or through the state habeas corpus action, or both, as set forth in the separate statement of exhaustion sections after each ground.

16. Petitioner Rhines has no petition or appeal now pending in any court, either state or federal, as to the judgment under attack, other than this action.

17. The names and addresses of each attorney who represented Charles Russell Rhines at various stages are the following:

a. At the preliminary hearing, arraignment and plea, trial, sentencing, and on direct appeal:

Lead Attorney:	Wayne Gilbert, (not practicing), 1529 Forest Hill Drive, Rapid City, South Dakota, 57701
Second Attorney:	Joseph M. Butler, Bangs, McCullen, Butler Foye & Simmons, P. O. Box 2670, Rapid City, South Dakota, 57709
Investigator/ Attorney:	Michael Stonefield, Pennington County Public Defender's Office, 315 St. Joseph Street, # 44, Rapid City, South Dakota, 57701

b. On the State Habeas Corpus proceeding and appeal therefrom:

Michael W. Hanson, 505 West 9th Street, #202, Sioux Falls, South Dakota, 57104.

18. Petitioner Rhines was sentenced on January 29, 1993, on all charges in the case, with the sentence imposed for the first degree murder conviction being death by lethal injection.

PRAYER

Wherefore, Petitioner Charles Russell Rhines prays that the Court grant Petitioner all relief to which he may be entitled in this proceeding.

Dated at Sioux Falls, South Dakota, this 16th day of November, 2000.

DAVENPORT, EVANS,
HURWITZ & SMITH, L.L.P.

/s/ Roberto A. Lange
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Facsimile: (605) 336-6842
Attorneys for Defendant
Charles Russell Rhines

I declare under penalty of perjury that the foregoing is true and correct to my best knowledge.

Exercised on this 16 day of November, 2000.

/s/ Charles Russell Rhines
Charles Russell Rhines

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, v. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. 00-5020-KES STATE'S RESPONSE TO PROCEDURAL ORDER AND MOTION TO DISMISS (Filed Jan. 22, 2001)

COMES NOW, Respondent in the above-entitled matter, by and through his counsel of record, and hereby responds to the Procedural Order entered by this Court on May 17, 2000, as follows:

1. Throughout this Response, Respondent will be referred to [sic] "Respondent" or "State." Petitioner, Charles Russell Rhines, will be referred to as "Petitioner." References to the Settled Record from Petitioner's criminal case, Pennington County File No. 93-81, will be indicated by "SR." References to the criminal trial transcripts will be designated by "TT." References to the Pennington County State Habeas Corpus Settled Record, Pennington County Civ. No. 96-1070, will be indicated by "SRHC." References to the Habeas Corpus Hearing transcripts will be designated by "HCT." All references will be followed by the applicable page number(s).

2. In discussions with the Pennington County Clerk of Court's Office, counsel for Respondent was informed that both the criminal and the civil habeas corpus file in

this matter, as referred to in paragraph 1, were sent to the federal district court on March 29, 2000. Therefore, Respondent will not be forwarding either file to this Court with its Procedural Response.

3. At present, Petitioner is lawfully incarcerated at the South Dakota State Penitentiary in Sioux Falls, South Dakota, by authority of a Judgment of Conviction entered by the Honorable John K. Konenkamp. Petitioner's Judgment of Conviction in Pennington County Criminal File 93-81 occurred when a Pennington County jury found him guilty of premeditated first-degree murder and third degree burglary. SR 426, 483.

4. Pursuant to SDCL 23A-27A-2, a presentence hearing was held before the same jury panel on January 25, 1993. On January 26, 1993, the jury returned a sentence of death by lethal injection, finding four aggravating circumstances to exist in connection with the death of Donnivan Schaeffer: (1) the offense of first-degree murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture; (2) the offense of first-degree murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind; (3) the offense of first-degree murder was committed for the purpose of avoiding, interfering with, or preventing lawful arrest; and (4) Defendant committed the offense of first-degree murder for himself for the purpose of receiving money. SR 481, 482.

5. On January 29, 1993, the trial court filed a warrant of death sentence and execution. SR 483, 484. Judgment of guilty of first-degree murder was entered on January 29, 1993. Petitioner was sentenced to death by lethal injection pursuant to SDCL ch. 23A-27A for the

crime of first-degree murder. SR 485, 487. Judgment was entered against Petitioner for third-degree burglary on the same date. Petitioner was sentenced to ten years in the South Dakota State Penitentiary on the burglary conviction. SR 488, 489. On February 16, 1993, the State dismissed the habitual offender information filed against Petitioner pursuant to SDCL 23A-44-2. SR 584.

6. The South Dakota Supreme Court affirmed Petitioner's Judgment of Conviction and Sentence, as set forth in paragraphs 3 and 4, in his direct appeal. *State v. Rhines*, 1996 S.D. 55, 548 N.W.2d 415, *cert. denied, Rhines v. South Dakota*, 519 U.S. 1013, 117 S.Ct. 522, 136 L.Ed.2d 410 (1996). One copy of the South Dakota Supreme Court file and decision affirming Petitioner's conviction and sentence is included with the State's Response and is being sent to the Court. Petitioner raised the following 14 issues in his direct appeal:

I. Whether the trial court erred by not suppressing Rhines' statements of June 19, and 21, 1992.

II. Whether the trial court erred in excusing prospective juror Diane Staeffler for cause.

III. Whether the State's calculated and selective use of peremptory [sic] challenges to exclude prospective jurors with reservations about the death penalty violated due process.

IV. Whether the South Dakota capital punishment statutes are constitutional.

V. Whether the trial court erred by allowing victim impact testimony.

VI. Whether the evidence was sufficient to sustain the jury's finding of torture under aggravating circumstance § 23A-27A-1(6).

VII. Whether the trial court erred in its instructions regarding aggravating circumstance § 23A-27A-1(6), depravity of mind.

VIII. Whether the trial court erred in its instructions regarding aggravating circumstances § 23A-27A-1(3).

IX. Whether the jury's consideration of one or more invalid aggravating circumstances requires reversal of the death sentence.

X. Whether the trial court erred by allowing into evidence statements made by Rhines concerning the justice system.

XI. Whether the trial court erred in refusing to appoint a forensic communication expert.

XII. Whether the trial court erred by refusing several of Rhines' proposed jury instructions.

XIII. Whether the death sentence was imposed under the influence of passion, prejudice or other arbitrary factors.

XIV. Whether this court should conduct its statutorily-required proportionality review using a broad pool of "similar cases," and allow presentation at a later time of further evidence and arguments on proportionality.

One copy of Petitioner's and State's briefs, including the proportionality briefs, filed with the South Dakota

Supreme Court in Petitioner's direct appeal, are included with the State's Response and is being sent to the Court.

7. Petitioner filed an Application for Writ of Habeas Corpus in Circuit Court, Seventh Judicial Circuit, Pennington County, South Dakota on December 5, 1996. SRHC 1-2. An Amended Second Application for Writ of Habeas Corpus was filed by Petitioner on October 20, 1995. An evidentiary hearing was held before the Honorable Merton B. Tice, on April 6, 1998, with subsequent testimony of Michael Butler being introduced by way of deposition on June 5, 1998. The habeas court issued a written opinion, dated October 8, 1998, which denied the amended application and quashed the writ. SRHC 332-343. Findings of Fact, Conclusions of Law and Order were entered on November 16, 1998. SRHC 426-471.

8. Petitioner appealed to the South Dakota Supreme Court from the Order denying Petitioner habeas corpus relief. The South Dakota Supreme Court affirmed the circuit court Order denying Petitioner's Application for Writ of Habeas Corpus. *Rhines v. Weber*, 2000 S.D. 19, 608 N.W.2d 303. One copy of the South Dakota Supreme Court file and decision affirming the denial for habeas corpus relief is included with the State's Response and is being sent to the Court. Respondent raised the following 25 issues on appeal:

(1) Charles Russell Rhines had ineffective assistance of counsel:

A. One of Charles Russell Rhines' counsel was depressed and engaged in theft during the representation.

B. One of Charles Russell Rhines' counsel told the jury during closing, argument at

the penalty phase of the trial, that he supported the death penalty.

C. Charles Russell Rhines' counsel failed to raise in the direct appeal, the failure of the trial court to specifically answer the jury's question on prison life.

D. Charles Russell Rhines' counsel did not argue the case of *Simmons v. South Carolina*, 512 U.S. 154, 124 L.Ed.2d 133, 114 S.Ct. 2187 (1994), in the direct appeal.

E. Charles Russell Rhines' counsel did not attempt to exclude the fact that he is homosexual.

F. Charles Russell Rhines' counsel should have attempted to let him make an unsworn allocution to the jury at the penalty phase of the trial.

G. Charles Russell Rhines' counsel did not attempt to suppress his confession by means other than inadequate advisement of the Miranda Rights.

H. Charles Russell Rhines' counsel did not submit jury instructions directing the jury not to consider the number of possible aggravating circumstances.

I. Charles Russell Rhines' counsel failed to investigate his background for mitigation evidence.

J. Charles Russell Rhines' counsel were ineffective by not obtaining and submitting a letter to the state offering to plead guilty in return for a life sentence.

(2) That the Eighth Amendment required the South Dakota Supreme Court to perform harmless error analysis on the effect of the sentencing jury's consideration of an invalid statutory aggravating circumstance, before it could uphold the jury's death sentence.

(3) The Eighth Amendment error which occurred at Charles Russell Rhines' sentencing trial was not cured by the South Dakota Supreme Court's affirmance of his death sentence, when that court did not conduct harmless error analysis on the effect of the sentencing jury's consideration of an invalid statutory aggravating circumstance, when the State's penalty argument suggested to the jury that Charles Russell Rhines was more deserving of the death penalty because of the number of aggravating circumstances in his case.

(4) The trial court erred by not suppressing Charles Russell Rhines Statements of June 19 and 21, 1992.

(5) The trial court erred in excusing prospective juror Diane Staeffler for cause.

(6) The State's calculated and selective use of peremptory challenges to exclude prospective jurors with reservations about the death penalty violated due process.

(7) The South Dakota capital punishment statutes are unconstitutional.

(8) The trial court erred by allowing victim impact testimony.

(9) The evidence was insufficient to sustain the jury's finding of torture under aggravating circumstance § 23A-27A-1(6).

(10) The trial court erred in its instructions regarding aggravating circumstances § 23A-27A-1(3).

(11) The jury's consideration of one or more invalid aggravating circumstances requires reversal of the death sentence.

(12) The trial court erred by allowing into evidence statements made by Charles Russell Rhines concerning the justice system.

(13) The trial court erred in refusing to appoint a forensic communication expert.

(14) The trial court erred by refusing several of Charles Russell Rhines proposed jury instructions.

(15) The death sentence was imposed under the influence of passion, prejudice or other arbitrary factors.

(16) This court should conduct its statutorily-required proportionality review using a broad pool of "similar cases," and allow presentation at a later time of further evidence and arguments on proportionality.

One copy of Respondent's Brief and Reply Brief, along with Petitioner's Brief, are included with the State's Response and is being sent to the Court.

9. In Petitioner's present federal Application for Habeas Corpus Relief, Petitioner raises 22 issues:

1. The Fifth and Fourteenth Amendment rights of Mr. Rhines were infringed through admission and use at trial of Mr. Rhines' statements to law enforcement officers on June 19 and 21, 1992.

2. The rights of Mr. Rhines to due process, an impartial jury, and to equal protection of the law were violated by exclusion for cause of two prospective jurors: A) Diane Staeffler and B) Jack Meyer.

3. The rights of Mr. Rhines to due process, an impartial jury, and equal protection of the law were violated by the State's calculated and selective use of peremptory challenges to exclude jurors with scruples or reservations about imposition of the death penalty.

4. Mr. Rhines' constitutional protection against ex post facto laws, the Eighth Amendment right against cruel and unusual punishment, and right to due process and equal protection of the law were violated by use of victim impact testimony during the penalty phase.

5. The due process, equal protection and Eighth Amendment rights of Mr. Rhines to be free from cruel and unusual punishment were infringed through imposition of the death penalty by a jury that considered an unconstitutional "depravity of mind" aggravating factor.

6. Mr. Rhines' rights to due process, equal protection and to be free from cruel and unusual punishment were violated on account of the unconstitutionality of the

South Dakota capital punishment statutes in several respects.

7. The Fifth Amendment right to due process, the Eighth Amendment rights to be free from cruel and unusual punishment and the equal protection rights of Mr. Rhines were violated by improper jury instructions during the penalty phase.

8. There was constitutionally insufficient evidence to support a finding of certain aggravating circumstances.

9. Mr. Rhines' Fifth Amendment right to due process of law and the Sixth Amendment right to assistance of counsel were violated through the ineffective assistance of his trial counsel.

A. The absence of any true mitigation investigation on behalf of Rhines;

B. The tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines, including failure to contact or call available witnesses – including, but not limited to, John Foursek, James Mighell and Connie Royer – who would have provided helpful testimony for Mr. Rhines in the penalty phase;

C. The failure to present to the jury during the penalty phase any information about Rhines' willingness to accept culpability, whether through information on Rhines' effort to plead guilty to first degree murder or through Rhines' right to give an allocution to the jury at the penalty phase;

D. The failure of the defense team to make a motion in limine and objections to prevent presentation of information on the homosexuality of Charles Rhines, and instead publicizing to the jury Rhines' homosexuality during voir dire;

E. The inappropriate and ineffective handling of the jury note raising questions during penalty phase deliberations about Mr. Rhines personally and the meaning of life imprisonment;

F. The need for the appointed investigator, Michael Stonefield, to take over much of the defense work in the case due to problems with the defense team;

G. The ineffective representation of Mr. Rhines by one attorney who was suffering from depression and later disbarred for theft, a second attorney who openly and repeated [sic] told the jury that he supported the death penalty, and a third attorney who was supposed to be the "investigator" and ended up doing the majority of the work.

H. The failure to catch and correct erroneous and false, yet highly prejudicial testimony from Glen Wishard.

I. The failure to request the hiring of, consult with, or hire a mitigation consultant or expert.

J. The failure to [sic] trial counsel to register objections to keep out irrelevant yet prejudicial testimony such as Rhines having

access to a gun, a statement by Rhines at the victim's funeral.

10. The rights of Mr. Rhines to due process, equal protection under law, and to be free from cruel and unusual punishment were violated by the Court's errors in its proportionality review and review of whether imposition of the death penalty was under passion, prejudice or other arbitrary factors.

11. The due process rights and right to adequate assistance of counsel of Rhines were violated by the refusal of the trial court to appoint a forensic communication expert.

12. The due process and equal protection rights of Mr. Rhines were violated by various acts of prosecutorial misconduct.

13. The Fifth, Sixth and Fourteenth Amendment rights of Mr. Rhines were violated as a result of the failure to have Mr. Rhines present or allow him to participate in the handling of the jury note and response to the jury note.

FIRST MOTION TO DISMISS

10. The above-named Respondent respectfully moves this Court for an Order, pursuant to F.R.C.P. 12(b)(6), 28 U.S.C. 2254 dismissing Grounds 2 (equal protection claim as to Staeffler and Meyer, and all claims as to Meyer); 3 (equal protection claim, Fifth & Eighth Amendment claims); 4 (equal protection and due process); 6(E); 9 (all Fifth Amendment claims); 9(B) (Sixth Amendment claim); 9(H) (Sixth Amendment claim); 9(I) (Sixth Amendment

claim); 9(J) (Sixth Amendment claim); 10 (due process, equal protection and Eighth Amendment claims); 12; and 13, of Petitioner's First Amended Petition for Writ of Habeas Corpus because these issues have been procedurally defaulted.

11. In the first amended petition for writ of habeas corpus, Petitioner states a number of claims that were not presented to the state courts, or were never presented nor attempted to be presented to the South Dakota Supreme Court. The purpose of this response is, in part, to set out the Respondent's view on the procedural status of Petitioner's various claims. For that reason, this pleading does not make a substantive response to the Petition. Rather, it addresses procedural issues, and also moves to dismiss certain claims that are either procedurally defaulted, or are without merit on their face. These claims are without merit because they do not state federal claims, or because it is plain that there is no ruling of the state courts "contrary to or [which] involves an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States", nor is there an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d).

28 U.S.C. § 2254(b) sets out the statutory principles of exhaustion of state remedies before a federal habeas case may be decided. That subsection reads as follows:

> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

28 U.S.C. § 2254(c) emphasizes that there must be complete exhaustion, in that if Petitioner has the right to raise a given issue in state court by *any* means, he must do so.

Eighth Circuit law prior to these statutes is basically consistent with them. The statutes may require somewhat stricter exhaustion standards than were previously in place, with the exception that the writ may be *denied* on the merits without exhaustion. At least two methods of exhaustion have been recognized. In *Smittie v. Lockhart*, 843 F.2d 295, 296-97 (8th Cir. 1988), the court explained exhaustion by presentation of issues to the state courts, as well as exhaustion by futility of state remedies (that is, having no presently available state remedy). Exhausting by presenting the claim requires that the same issue be

presented to the State's highest court, or that all methods for attempting to present the issue be undertaken. Appropriately presenting the issue was explained in *Kelly v. Trickey*, 844 F.2d 557, 558-59 (8th Cir. 1988), as requiring reference before the state court to "a specific federal constitutional right, the particular constitutional provision, or a federal or state constitutional case raising the same federal issue." In addition, the federal petition must allege both the same facts *and* an identical legal issue to that alleged in the state court in order to exhaust the issue. *See Martin v. Solem*, 801 F.2d 324, 330 (8th Cir. 1988). The habeas petitioner must fairly present to the state court the substance of his or her federal habeas claim. Put another way, the habeas petitioner must provide the state courts with a fair opportunity to apply the controlling legal principles to the facts bearing on the federal constitutional claim. It is not enough that the facts necessary to support the federal claim were before the state courts or that a somewhat similar state law claim was made. The same facts must be asserted and the same federal constitutional issue must also be asserted before the state's highest court. *Id.*, citing *Anderson v. Harless*, 459 U.S. 4 (1982).

Based on these standards, Petitioner has failed to exhaust, by presentation, a number of his issues. Those are pointed out below. In spite of this failure to present, however, Petitioner's remedies are exhausted because Petitioner cannot now return to the state courts to assert these issues. Such a return to state court would be futile. This is shown by at least two South Dakota Supreme Court cases. In *Ashker v. Class*, 534 N.W.2d 66, 67 (S.D. 1995), the South Dakota Supreme Court held that "cause and prejudice" must be shown in order for a Petitioner to

bring a second habeas petition after he has already had one such petition determined in the state courts. This cause and prejudice standard is the same standard used by the federal courts to overcome procedural default, see below. *Id.* All of the issues Petitioner now seeks to raise, which were not previously presented to the state courts, were apparent on the record at the time of his state habeas petition and appeal. He cannot, therefore show cause and prejudice for not raising them in his one state habeas petition. The case of *In the Matter of the Application of Kurt A. Novaock for Writ of Habeas Corpus and Alternatively for a Writ of Error Coram Nobis*, 1998 S.D. 3, 572 N.W.2d 840 has the same holding as *Ashker*. In addition to reasserting the principles of *Ashker*, *Novaock*, 1998 S.D. 3, ¶ 6, 572 N.W.2d at 842, the Court further held, *id.* at ¶ 13, n.3, 572 N.W.2d at 844, n.3, that inability to overcome cause and prejudice standards does not render the statute unavailable or inadequate so as to allow for a writ of error coram nobis. It would be futile for Petitioner to return to state court: He has no currently available remedy there, whether habeas corpus or coram nobis. Petitioner's remedies are exhausted by presentation as to some issues, but as to those issues not presented, they are exhausted because there is no presently available state remedy.

Since all of the issues Petitioner presents are exhausted In one way or another, the next step, under *Smittie v. Lockhart*, is for the court to proceed to analyze procedural default. The concept of procedural default is generally traced back to *Wainwright v. Sykes*, 443 U.S. 72, 81, 87 (1977). Although it is related to exhaustion, it is a separate concept. *Smittie*, 843 F.2d at 296. The four-step process outlined in *Smittie* states that if a claim has not

been fairly presented to the state courts, the court must determine whether there are any currently available state remedies. Petitioner fairly presented some issues, others he did not. If the State remedy is not currently available, and if that issue has not been fairly presented, then there is a procedural default. *Smittie*, 843 F.2d at 296. The United States Supreme Court has held that failure to seek discretionary review in a state supreme court is one way of defaulting, and when a petitioner has failed to do that, he or she has not satisfied the presentation requirement. *O'Sullivan v. Boerckel*, 119 S.Ct. 1728 (1999). If there is a procedural default, the default may be overcome, and habeas relief may only be considered, if the petitioner can show cause for the default and actual prejudice as a result, or if Petitioner can demonstrate that failure to consider the claim will result in conviction of someone who is actually innocent of the underlying crime. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

The court explained in *Coleman* the basis of the *Wainwright* procedural default rules. The United States Supreme Court has held that it will not review a question of federal law decided by a state court if the decision of a state court rests on a state law ground that is independent of the federal question and adequate to support the court's judgment. *Coleman*, 501 U.S. at 729. This rule arises out of the concept of federalism, that is, the judgment ought not to be reversed where state law supports it independent of any federal issues. The Supreme Court applies the same rule to the claims of state prisoners in habeas corpus actions. *Coleman*, 501 U.S. at 729-730. The doctrine applies to bar federal habeas corpus when a state court declines to address a prisoner's federal claim or claims because the prisoner failed to meet a state procedural

requirement. The state judgment, in such cases, rests on independent and adequate state law procedural grounds. *Id.* (Citing *Wainwright*, 433 U.S. at 81, 87). The court, in *Coleman*, said that both the exhaustion and procedural default rules serve the same purpose and are grounded on principles of comity. *Coleman*, 501 U.S. at 731-32. The court noted that one may meet the exhaustion requirement by defaulting a federal claim in state court, but that the "independent and adequate state ground" doctrine insures that the State's interest in correcting its own mistakes is respected in all federal habeas cases, not merely in those when there has been a failure to exhaust. Thus, the procedural default rule must be applied to those cases where Petitioner has exhausted by failing to exercise his state remedies.

The claims that Petitioner has not made in state court are procedurally defaulted, and must be dismissed pursuant to procedural default doctrine. South Dakota Supreme court precedent, *Ashker* and *Novaock*, clearly states that neither habeas nor coram nobis relief is presently available, and Petitioner failed to ask for such relief on certain issues when it was available. Under the analysis required in *Smittie v. Lockhart*, 843 F.2d at 296, the court must then proceed to determine whether there is cause and prejudice for these failures to present, and also whether there is a fundamental miscarriage of justice. There is no fundamental miscarriage of justice because Petitioner confessed; he is not innocent.

This leaves the cause and prejudice standard. In general, it is worth noting that if Petitioner blames the failure to raise these constitutional violations on his habeas lawyer, that contention does not show cause. *Coleman*, 501 U.S. at 752-54. Attorney error, ignorance, or

inadvertence by state habeas or post conviction counsel cannot provide cause under the rules of *Wainwright*. There is no federal constitutional right to assistance of counsel once direct appeals are finished. In addition, it is not "cause" under the Wainwright rules that state courts have not ruled because issues have not been raised. This failure to raise or failure to rule are, of course, the very essence of procedural default. The *default itself* cannot constitute cause. *Coleman*, 501 U.S. at 752-54.

Further, no prejudice is shown in this case. There is no reason to believe that the result would have been different if any of the defaulted issues had been raised. The standard of actual prejudice requires more than a showing that there might have been a change in outcome. Petitioner must show that the alleged errors worked to his actual and substantial disadvantage, and infected the entire trial with error of constitutional dimension. *Murray v. Carrier*, 477 U.S. 478, 494 (1986).

SECOND MOTION TO DISMISS

12. In the alternative, the above-named Respondent respectfully moves this Court for an Order, pursuant to F.R.C.P., Rule 12(b)(6), dismissing Ground 10 (state law proportionality review) of Petitioner's Petition for Writ of Habeas Corpus because this ground (if proven) does not raise a federal quest on (in violation of the Constitution or laws or treaties of the United States).

Federal habeas corpus is available only on behalf of a person in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S.Ct. 457, 480, 116 L.Ed.2d 385 (1991); *Engle v. Isaac*, 456 U.S. 107, 119, 102

S.Ct. 1558, 1567, 71 L.Ed.2d 783 (1982). Federal habeas is unavailable to retry state issues. *Milton v. Wainwright*, 407 U.S. 371, 377, 92 S.Ct. 2174, 2178, 33 L.Ed.2d 1 (1972). "A federal court may not issue the writ on the basis of a perceived error of state law." *Pulley v. Harris*, 465 U.S. 337, 341, 104 S.Ct. 871, 874-75, 79 L.Ed.2d 29 (1989).

If an issue alleges only a violation of state law, no federal claim is presented, and the petition is subject to dismissal for failure to state a claim. *Cox v. Lockhart*, 970 F.2d 448 (8th Cir. 1992).

THIRD MOTION TO DISMISS

13. The above-named Respondent respectfully moves this Court for an Order, pursuant to F.R.C.P. 12(b)(6) and 28 U.S.C. § 2254(d), dismissing all claims "adjudicated on the merits in state court proceedings" – Issues 1; 2 (due process as pertains to Diane Staeffler); 3 (due process and Sixth Amendment); 4 (ex post facto and 8th Amendment); 5; 6(A) through (D); 7; 8; 9(A) (Sixth Amendment claim); 9(C) (Sixth Amendment claim); 9(D) Sixth Amendment claim); 9(E) (Sixth Amendment claim); 9(F) (Sixth Amendment claim); 9(G) (Sixth Amendment claim); and 11 – because (1) the state court decision was not contrary to, nor did it involve an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States, and (2) the state court decision was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. *Ramdass v. Angelone*, 530 U.S. ___, 147 L.Ed.2d 125, 135-36, 120 S.Ct. ___ (2000); *Williams v. Taylor*, 529 U.S. ___, ___, 146 L.Ed.2d 389, 120 S.Ct. 1495 (2000); *Lindh v. Murray*, 521 U.S. 320, 334 n.7, 117 S.Ct.

2059, 2067 n.7, 138 L.Ed.2d 481 (1997); *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998); *Hall v. Washington*, 106 F.3d 742, 748-49 (7th Cir. 1997); *Nevers v. Killinger*, 169 F.3d 352, 362 (6th Cir. 1999).

In the instant case, Petitioner has made no allegation, nor could he, that the state court adjudication, on the merits, involved an unreasonable application of federal law as determined by the United States Supreme Court.

Therefore, the above raised grounds must fail and should be dismissed.

CONCLUSION

Based on the above arguments and authorities Respondents request that the Petition for habeas corpus be denied and the application dismissed in it [sic] entirety.

Dated this 18th day of January, 2001.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

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/s/ Grant Gormley
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Gary Campbell
Assistant Attorney General

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, v. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. No. 00-5020-KES SECOND AMENDED PROCEDURAL ORDER (Filed Feb. 20, 2001)

On February 16, 2001, Petitioner filed "Motion for Extension of Time to File Traverse." The court has reviewed the motion, and it is hereby

ORDERED that Petitioner shall have until April 17, 2001, to file a Traverse. The Traverse shall be a comprehensive responsive pleading which addresses issues of exhaustion and procedural default, and shall present alternative arguments of cause and prejudice or a fundamental miscarriage of justice, when applicable. Requests for an evidentiary hearing regarding cause and prejudice, or miscarriage of justice, shall be incorporated in to Petitioner's Traverse.

IT IS FURTHER ORDERED that if Respondent files a Reply, it shall be done no later than **May 17, 2001**, after the Traverse is filed.

IT IS FURTHER ORDERED that if Petitioner files a Sur-reply, he shall do so no later than **May 31, 2001**, after the Reply is filed. *The Sur-reply shall be limited to*

arguments concerning cause and prejudice or a fundamental miscarriage of justice.

IT IS FURTHER ORDERED that after the procedural status of the claims raised in the Amended Petition are fully briefed, the court will determine which claims will be reviewed on the merits. A scheduling order will be issued that will set forth when Petitioner shall file a Memorandum of Law Re: Merits of Claims, when Respondents shall file a Response Re: Merits of Claims, and when Petitioner shall file a Reply. Requests for an evidentiary hearing shall be incorporated into Petitioner's Memorandum of Law. The Petition will then be in a posture for the court to resolve the merits of the appropriate claims in this habeas corpus proceeding.

Dated February 20, 2001.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

* *

CHARLES RUSSELL RHINES,

Plaintiff,

vs.

DOUGLAS WEBER, Warden, South Dakota State Penitentiary,

Defendant.

CIV. NO. 00-5020-KES

PETITIONER'S PARTIAL TRAVERSE TO STATE'S RESPONSE AND MOTION TO DISMISS

(Filed Apr. 17, 2001)

* *

Petitioner Charles Russell Rhines hereby files this Partial Traverse consistent with the Court's Procedural Orders and to traverse the State's Response to Procedural Order and First Motion to Dismiss.

I. PRELIMINARY STATEMENT

A. Scope of the Traverse Filing.

The Court in its Second Amended Procedural Order set the scope of this Traverse filing as follows:

> The Traverse shall be a comprehensive responsive pleading which addresses issues of exhaustion and procedural default, and shall present alternative arguments of cause and prejudice or a fundamental miscarriage of justice, when applicable. Requests for an evidentiary hearing regarding cause and prejudice, or miscarriage of

justice, shall be incorporated into Petitioner's Traverse.

Second Amended Procedural Order dated February 20, 2000; see also *Amended Procedural Order* dated October 18, 2000 and *Procedural Order* dated May 17, 2000.

The procedural orders of the Court also state:

> IT IS FURTHER ORDERED that after the procedural status of the claims raised in the Amended Petition are fully briefed, the court will determine which claims will be reviewed on the merits. A scheduling order will be issued that will set forth when Petitioner shall file a Memorandum of Law Re: Merits of Claims, when Respondents file a Response Re: Merits of Claims, and when Petitioner shall file a Reply.

Second Amended Procedural Order dated February 20, 2001; see also *Amended Procedural Order* dated October 18, 2000; *Procedural Order* dated May 17, 2000.

The procedural orders make clear that the Court contemplates that the Traverse address issues of exhaustion and procedural default. The State has raised issues of exhaustion and procedural default in the State's Response to Procedural Order and Motion to Dismiss through its "First Motion to Dismiss." Consistent with the Court's procedural orders, this Traverse focuses upon the first Motion to Dismiss of the State.

The State also included in its Response to Procedural Order and Motion to Dismiss a "Second Motion to Dismiss" and "Third Motion to Dismiss." The State's Second Motion to Dismiss seeks dismissal of ground ten of the First Amended Petition For Writ of Habeas Corpus, and argues that ground ten does not raise a federal question. The

Second Motion to Dismiss does not raise an argument about exhaustion or procedural default, but rather an argument that regards the merit of ground ten and whether it can provide a basis for relief. Accordingly, Petitioner does not address the Second Motion to Dismiss in this Traverse, but would intend to address and refute the State's argument in its Memorandum of Law Re: Merits of Claims.

Likewise, the Third Motion to Dismiss of the State seeks dismissal of various claims in the First Amended Petition For Writ of Habeas Corpus not based on exhaustion and procedural default, but based on the State's argument that certain claims were "adjudicated on the merits in state court proceedings" and, according to the State, therefore do not provide grounds for habeas corpus relief. The State's Third Motion to Dismiss accordingly will be addressed in the Memorandum of Law Re: Merits of Claims, rather than in this Traverse.

If the Court would prefer the Second Motion to Dismiss and Third Motion to Dismiss to be addressed prior to or separate from the Memorandum of Law Re: Merits of Claims, then Petitioner would request that the Court enter a Third Amended Procedural Order. For the sake of preservation of the record, Petitioner objects to and resists the State's Second Motion to Dismiss and the State's Third Motion to Dismiss. However, consistent with the contemplation and procedural orders of the Court, Petitioner focuses his Traverse on issues of exhaustion and procedural default raised by the State in its first Motion to Dismiss.

B. System of Reference and Citation.

Both Petitioner in his First Amended Petition for Writ of Habeas Corpus and this Traverse and the State in its Response to Procedural Order and Motion to Dismiss employ the following citation system:

"SR" followed by page number = Settled Record from Petitioner's criminal case, Pennington County Criminal File No. 93-81.

"TT" followed by page number = Trial Transcript in Pennington County Criminal File No. 93-81.

"HCT" followed by page number = Habeas Corpus Transcript from Pennington County Civil. File No. 96-1070.

In the State's Response to Procedural Order and Motion to Dismiss, the State stated that it has provided the Court with a copy of the South Dakota Supreme Court file associated with *State v. Rhines,* 548 N.W.2d 415 (S.D. 1996), *cert. denied, Rhines v. South Dakota,* 519 U.S. 1013 (1996), and one copy of the South Dakota Supreme Court file for *Rhines v. Weber,* 608 N.W.2d 303 (S.D. 2000), inclusive of briefs submitted in those two cases. Accordingly, Petitioner has not submitted another copy of briefing to the South Dakota Supreme Court. Petitioner, in addressing arguments of exhaustion and procedural default, cites to those briefs by identifying them by name, date, and cited page. If the Court has not received those briefs or desires Petitioner to file another copy of those briefs, Petitioner would request that the Court issue an order to that effect.

II. EXHAUSTION OF GROUNDS IN FIRST AMENDED PETITION

A. Exhaustion Standard.

The exhaustion requirement is codified at 28 U.S.C. § 2254(b). This provision states:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

28 U.S.C. § 2254(b).

Perhaps the leading case in interpreting the exhaustion requirement is *Picard v. Connor,* 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971). In *Picard,* the Court considered whether the exhaustion requirement had been satisfied when a vague equal protection claim was asserted for the first time before the United States Supreme Court. *Id.* at 274 n.7 and 276, 92 S.Ct. at 511 n.7 and 513. The Court concluded that such an equal protection claim had not been exhausted because Petitioner previously had adverted to the Fourteenth Amendment only with reference to the challenge to the grand jury indictment. *Id.* at 277, 92 S.Ct. at 513. In discussing the exhaustion requirement, the Court in *Picard* reasoned:

> . . . Once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied. . . . Only if the state courts have had the first opportunity to hear the

> claims sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. Accordingly, we have required a state prisoner to present the state courts with the same claim he urges upon the federal courts.

Id. at 275-276, 92 S.Ct. at 512. The Court cautioned however:

> Hence, we do not imply that respondent could have raised the equal protection claim only by citing "book and verse of the federal Constitution." We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts.

Id. at 277-78, 92 S.Ct. at 513 (citations omitted).

In subsequent cases, the Supreme Court has made clear that the purpose of the exhaustion doctrine is "to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary." *Vasquez v. Hillery,* 474 U.S. 254, 257, 106 S.Ct. 617, 620, 88 L.Ed.2d 598 (1986). The Supreme Court has also stated: "The purpose of exhaustion is not to create a procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum, where meritorious claims may be vindicated and unfounded litigation obviated before resort to federal court" *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 10, 112 S.Ct. 1715, 1720, 118 L.Ed. 2d 318 (1992). The Supreme Court has acknowledged that a petitioner can exhaust a claim either by direct appeal of a conviction or through a state habeas petition, and that the failure of the state court to directly address a constitutional claim does not mean that the claim is not exhausted. *Castille v. Peoples,* 489 U.S. 346, 350-51, 109 S.Ct. 1056, 1059-60, 103 L.Ed.2d 380 (1989).

On several occasions, the United States Court of Appeals for the Eighth Circuit has discussed what a prisoner must do to satisfy the exhaustion requirement. In *Graham v. Solem,* 728 F.2d 1533 (8th Cir. 1984), *cert. denied,* 469 U.S. 842, the Eighth Circuit stated:

> Citation to a provision of the federal Constitution or a case addressing the constitutional basis of a claim, or a discernible reference to a federal constitutional right is all that is normally required.

Id. at 1535-36, *citing Anderson v. Harless,* 459 U.S. 4, 103 S.Ct. 276, 277-78 & n.3, 74 L.Ed.2d 3 (1982). That is, a petitioner may satisfy the exhaustion requirement by reference to either "a federal constitutional case, or a state case raising a pertinent federal constitutional issue" in proceedings in state court. *Kelly v. Trickey*, 844 F.2d 557, 558 (8th Cir. 1988).

The exhaustion requirement does not mandate that a petitioner "precisely articulate the issue in the state court, as long as the factual and legal basis of the claim is presented in the same manner to the state court. *Hill v. Lockhart,* 28 F.3d 832, 835 (8th Cir. 1994), *cent denied,* 513 U.S. 1102. A vague reference to "denial of fair trial" without mention of a constitutional provision or right may not provide a state court with a fair and meaningful opportunity to evaluate a claim. *Thomas v. Wyrick*, 622 F.2d 411, 412-13 (8th Cir. 1980). However, even an "abstract and conclusory" brief citing state cases can provide a state court with a fair and meaningful opportunity to consider the federal claim. *Morrow v. Wyrick,* 646 F.2d 1229, 1232 (8th Cir. 1981), *cert. denied,* 454 U.S. 899.

In sum, satisfaction of the exhaustion requirement of § 2254(b) is achieved by: "Citation to a provision of the federal Constitution *or* a case [whether federal or state] addressing the constitutional basis of the claim, *or* a discernible reference to a federal constitutional right." *Graham v. Solem,* 728 F.2d 1533, 1535 (8th Cir. 1984), *cert. denied,* 469 U.S. 842 (emphasis and bracketed supplied); *see also Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir. 1988) (support for bracketed material).

B. Analysis of Grounds in First Amended Petition.

The First Amended Petition for Writ of Habeas Corpus raised thirteen grounds for relief, some of which included subparts. With respect to each of the grounds, Petitioner included a Statement of Exhaustion. The State's First Motion to Dismiss challenges in part or in full eight grounds as not being exhausted and being procedurally defaulted. Each of Petitioner's thirteen grounds and issues as to exhaustion or absence of exhaustion are discussed separately below.

1. *Ground One:*

> *The Fifth and Fourteenth Amendment Rights of Mr. Rhines were infringed through admission and use at trial of Mr. Rhines' statements to law enforcement officers on June 19 and 21, 1992.*

The State in its first Motion to Dismiss does not challenge whether Ground One has been exhausted.

2. *Ground Two:*

> *The rights of Mr. Rhines to due process, an impartial jury, and to equal protection of the law were violated by exclusion for cause of two prospective jurors: A) Diane Staeffler; and B) Jack Meyer.*

The State in its Motion to Dismiss asserts that the equal protection claim as to exclusion of Diane Staeffler for cause is not exhausted and that all claims as to Jack Meyer being excused for cause are not exhausted.

A. Diane Staeffler.

The State appropriately does not challenge that claims of violation of Mr. Rhines' rights to due process and impartial jury indeed have been exhausted with respect to the exclusion for cause of juror Diane Staeffler. On direct appeal, the exclusion of Diane Staeffler for cause was raised by Mr. Rhines. *See Appellant's Brief* dated June 23, 1994, at pp. 28-41. On direct appeal, on the issue of exclusion of Diane Staeffler for cause, Petitioner cited directly to *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). *Appellant's Brief* dated June 23, 1994 at pp. 29, 40, 41. Petitioner also cited to the cases of *Davis v. Georgia,* 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); and *Gray v. Mississippi,* 41 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987).

The State seeks dismissal of the equal protection challenge (based on the Fourteenth Amendment to the United States Constitution) of Ground 2A, while acknowledging that Petitioner's due process claim and claim of violation of the Sixth Amendment to Impartial Jury Claims are indeed exhausted by Rhines. The equal protection and due process provisions of the Fourteenth Amendment provide the vehicle by which the due process protection of the Fifth Amendment and the right to impartial jury of the Sixth Amendment are made applicable to

the states. *Pointer v. State of Texas,* 380 U.S. 400, 401-403, 85 S.Ct. 1065, 1066-67 (1965); *Malloy v. Hogan*, 378 U.S. 1, 6-7, 84 S.Ct. 1489, 1492-93, 12 L.Ed.2d 653 (1964) (Fifth Amendment guarantee against self-incrimination made applicable to states by Fourteenth Amendment); *Gideon v. Wainwright,* 372 U.S. 335, 341-343, 83 S.Ct. 792, 795-96, 9 L.Ed.2d 799 (1963) (Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel applicable to States; *Mapp v. Ohio*, 367 U.S. 643, 656-57, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961).

Indeed, the United States Supreme Court cases cited by Mr. Rhines in his direct appeal recognize that the Fourteenth Amendment is implicated by exclusion of jurors for cause based on their expression of scruples against infliction of the death penalty. In *Witherspoon,* the United States Supreme Court reversed imposition of the death penalty when potential jury members were eliminated for cause because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its imposition. The Supreme Court in *Witherspoon* reasoned:

> But it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which the petitioner was entitled under the Sixth and *Fourteenth* Amendments.

Witherspoon, 391 U.S. at 518, 88 S.Ct. at 1775 (emphasis supplied).

Likewise, in the *Gray* case, the United States Supreme Court reversed a conviction where a juror was improperly excluded for cause after being initially equivocal [sic] **and** ultimately stating that she could consider the

death penalty in an appropriate case. In applying the *Witherspoon* rationale to reverse the conviction, the United States Supreme Court in *Gray* recognized:

> In *Witherspoon,* this Court held that a capital defendant's right, under the Sixth and Fourteenth Amendments, to an impartial jury prohibited the exclusion of veneer [sic] members "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction".

Gray, 41 U.S. at 658, 107 S.Ct. at 2051. The Supreme Court in *Gray* further stated:

> It is necessary, however, to keep in mind the significance of a capital defendant's right to a fair and impartial jury under the Sixth and Fourteenth Amendments.

Gray, 41 U.S. at 658, 107 S.Ct. at 2051; *see also Id.*, 41 at 663, 107 S.Ct. at 2054 (again citing Sixth and Fourteenth Amendment constitutional rights).

The South Dakota Supreme Court, in the direct appeal in *State v. Rhines,* 548 N.W.2d 415 (S.D. 1996), recognized that the Fourteenth Amendment was implicated in Rhines' challenge to the exclusion of Diane Staeffler for cause. Part of the Court's opinion on the issue read as follows:

> Both the United States and South Dakota Constitutions guarantee trial by an impartial jury. *State v. Hansen,* 407 N.W.2d 217, 220 (S.D. 1987) (citing U.S. Const. Amend. VI; S.D. Const. Art. VI, 7; SDCL 23A-16-3); *Morgan v. Illinois,* 504 U.S. 719, 728, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492, 502 (1992) (holding the Sixth and *Fourteenth* Amendments to the United States

Constitution require "the impartiality of any jury that will undertake capital sentencing") . . . In *Witherspoon,* the Court held: "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. at 1777, 20 L.Ed.2d at 784-85. The Court reasoned that executing a death sentence returned by such a jury deprives the defendant of his life without due process of law and infringes his right to trial by an impartial jury under the Sixth and Fourteenth Amendments. 391 U.S. at 518, 88 S.Ct. at 1775, 20 L.Ed.2d at 783.

State v. Rhines, 548 N.W.2d 415, 430 (S.D. 1996).

A Petitioner such as Rhines may exhaust a claim by reference to either "a federal constitutional case, or a state case raising a pertinent federal constitutional issue" in proceedings in state court. *Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir. 1988). In this matter, Rhines cited to two United States Supreme Court cases that explicitly include the Fourteenth Amendment among the constitutional protections against a jury predisposed toward a verdict of death. The South Dakota Supreme Court indeed recognized the Fourteenth Amendment as one of the grounds insuring to Rhines the right to trial by an impartial jury in a death case, while discussing the *Witherspoon* decision, one of the decisions cited by Petitioner to the court. *State v. Rhines,* 458 N.W.2d 415, 430 (S.D. 1996). After all, it is the Fourteenth Amendment that makes the Fifth and Sixth Amendment protections apply in state court. Under these circumstances, the state has no legitimate grounds

to assert that a challenge based on the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution has not been exhausted with respect to the challenge to the exclusion for cause of Diane Staeffler.

B. <u>Jack Meyer.</u>

In the First Amended Petition For Writ of Habeas Corpus, Petitioner, in his Statement of Exhaustion, acknowledged: "The handling of juror Jack Meyer has not been separately exhausted in state court".

3. *Ground Three:*

The rights of Mr. Rhines to due process, an impartial jury, and equal protection of the law were violated by the State's calculated and selective use of peremptory challenges to exclude jurors with scruples or reservations about imposition of the death penalty.

The State in its First Motion to Dismiss asserted that the equal protection, Fifth and Eighth Amendment challenges set forth by this ground were not exhausted. The State raised no challenge to exhaustion of the claim of an impartial jury under the Sixth Amendment. Indeed, Petitioner raised in his direct appeal a challenge to the State's calculated and selective use of peremptory challenges, including citation to the cornerstone case of *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). *Appellant's Brief* dated June 23, 1994, at 41-45.

Initially, Petitioner acknowledges that he raises no Eighth Amendment challenge as a part of Ground Three. The initial articulation of Ground Three in the First Amended Petition for Writ of Habeas Corpus does not

itself contain reference to the Eighth Amendment. The "supporting facts" section does reference the Eighth Amendment, as a consequence of inartful editing.

The Fourteenth Amendment protections of due process and equal protection, however, are implicated by the State's calculated and selective use of preemptory challenges to exclude jurors with scruples or reservations about imposing the death penalty. As stated in Part II.B.2. above, the *Witherspoon* case based a reversal of a conviction in Illinois State court on a violation of not only the Sixth Amendment but also the Fourteenth Amendment when prospective jury members were eliminated for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. *Witherspoon,* 391 U.S. 490, 519, 88 S.Ct. 1770, 1775, 20 L.Ed.2d 776 (1968). The South Dakota Supreme Court recognized that both the Sixth and Fourteenth Amendments were implicated by Rhines' cite to *Witherspoon* and challenge to the partiality of the jury. *State v. Rhines,* 548 N.W.2d 415, 430 (S.D. 1996).

Indeed, it is through the Fourteenth Amendment that constitutional protections contained in certain provisions of the Bill of Rights, such as the Fifth and Sixth Amendments, are safeguarded to state criminal defendants. *Pointer v. State of Texas,* 380 U.S. 400, 401-403, 85 S.Ct. 1065, 1066-67 (1965); *Malloy v. Hogan,* 378 U.S. 1, 6-7, 84 S.Ct. 1489, 1492-93, 12 L.Ed.2d 653 (1964) (Fifth Amendment guarantee against self-incrimination made applicable to states by Fourteenth Amendment); *Gideon v. Wainwright,* 372 U.S. 335, 341-343, 83 S.Ct. 792, 795-96, 9 L.Ed.2d 799 (1963) (Fourteenth Amendment makes the Sixth Amendment's guarantee of right to counsel applicable

to States; *Mapp v. Ohio,* 367 U.S. 643, 656-57, 81 S.Ct. 1684, 1692, 6 L.Ed.2d 1081 (1961).

In Ground Three, it is Petitioner's intention to challenge the State's calculated and selective use of peremptory challenges to exclude jurors who had with imposing the death penalty, based on the Sixth Amendment guarantee to an impartial jury as secured by the Fourteenth Amendment guarantees of due process and equal protection. If the verbiage used in Ground Three leads the Court to a concern about a mixed Petition, then Petitioner asks for leave to file a Second Amended Petition for purposes of clarifying Ground Three.

4. *Ground Four:*

> *Mr. Rhines' constitutional protection against ex post facto laws, the Eighth Amendment Right against cruel and unusual punishment, and rights to due process and equal protection of law were violated by use of victim impact testimony during the penalty phase.*

The State's First Motion to Dismiss challenges exhaustion of the claims in Ground Four to equal protection and due process. The State's First Motion to Dismiss does not challenge exhaustion of the claim of violation of the ex post facto protection of the United States Constitution or the Eighth Amendment of the United States Constitution.

Petitioner in Ground Four refers to the due process and equal protection rights of the Fourteenth Amendment, in that it is the Fourteenth Amendment that makes the Eighth Amendment protection against cruel and unusual punishment applicable to a state court defendant.

Petitioner, in his Brief on direct appeal as a part of his argument regarding the victim impact statement, cited the case of *Booth v. Maryland,* 42 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). *Appellant's Brief* dated June 23, 1994 at 55. The South Dakota Supreme Court also cited to the *Booth* case in its opinion. *State v. Rhines,* 548 N.W.2d 415 (S.D. 1996). The *Booth* case, which focuses upon the application of the Eighth Amendment to victim impact statements, states as follows:

> The prohibitions of the Eighth Amendment apply to the States' through the Due Process Clause of the Fourteenth Amendment. *See Robinson v. California,* 370 U.S. 660, 666, 82 S.Ct. 1417, 1420, 8 L.Ed.2d 758, (1962).

Booth, 482 U.S. 496, 500 N.5, 107 S.Ct. 2529, 2532 N.5.

It is sufficient to exhaust claims that Petitioner cite to a provision of the Federal Constitution, *or* to a case addressing the constitutional basis to the claim, or make a discernable reference to a federal constitutional right *Graham v. Solum,* 728 F.2d 1533, 1535-36 (8th Cir. 1984), *cert. denied,* 469 U.S. 842. The purpose is not to erect an artificial procedural hurdle on the path to the federal habeas court. *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 10, 112 S.Ct. 1715, 1720, 118 L.Ed.2d 318 (1992). In this circumstance, Petitioner cited to a federal constitutional case raising the pertinent constitutional issue and referring to the well-established principle that the Fourteenth Amendment extended to states application and protection of certain of the Bill of Rights. That is enough to satisfy the exhaustion requirement of Section 2254. *See Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir. 1988).

5. *Ground Five:*

The due process, equal protection and Eighth Amendment Rights of Mr. Rhines to be free from cruel and unusual punishment were infringed through imposition of the death penalty by a jury that considered an unconstitutional "depravity of mind" an aggravating factor.

The State does not challenge in its first Motion to Dismiss the fact that this claim has been exhausted procedurally.

6. *Ground Six:*

Mr. Rhines' rights to due process, equal protection and to be free from cruel and unusual punishment were violated on account of the unconstitutionality of the South Dakota Capital Punishment statutes in several respects.

Ground Six contains five subparts labeled A through E. The State in its first Motion to Dismiss challenges only Ground 6.E. as not having been procedurally exhausted. In the first Amended Petition For Writ of Habeas Corpus, Petitioner acknowledges in the Statement of Exhaustion section of Ground Six: "Issue 6.E. was not directly raised previously by Rhines, but is futile to pursue in State Court in light of the South Dakota Supreme Court Ruling in *State. v. Moeller,* 616 N.W.2d 424, 463 (S.D. 2000)"

7. *Ground Seven:*

The Fifth Amendment Right to due process, the Eighth Amendment Rights to be free from cruel and unusual punishment and the Equal Protection Rights of Mr. Rhines were violated by improper jury instructions during the penalty phase.

The State in its first Motion to Dismiss does not challenge the fact of exhaustion of Ground Seven.

8. *Ground Eight:*

There was constitutionally insufficient evidence to support a finding of certain aggravating circumstances.

The State in its first Motion to Dismiss does not challenge the fact of exhaustion of Ground Eight.

9. *Ground Nine:*

Mr. Rhines' Fifth Amendment Right to due process of law and the Sixth Amendment Right to assistance of counsel were violated through the ineffective assistance of his trial counsel.

The State does not challenge the fact that Ground 9, subparts A, C, D, E, F, and G have been exhausted. The State limits its challenge to exhaustion in the first Motion to Dismiss to Ground 9 subparts B, H, I, and J.

Ground B relates to the tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines, referring to the failure to contact or call available witnesses – including, but not limited to, John Fousek, James Mighell and Connie Royer – who would have provided helpful testimony for Mr. Rhines in the penalty phase. Ground 9.B. is the functional equivalent of Ground 1.I. raised by Mr. Rhines in his habeas corpus case and appeal. Indeed, the tepid presentation of evidence during the penalty phase by the attorneys for Mr. Rhines was the subject of Rhines' state habeas corpus grounds I.B., F., and I., and indirectly ground I.A. as well. Petitioner presented each of these grounds to the South Dakota Supreme Court

on appeal in the habeas corpus case. *Appellant's Brief* dated December 10, 1998, at 9, 17-37.

In Rhines' argument on appeal in the State Habeas Corpus case, the Appellant's Brief contains direct and repeated reference to "ineffective assistance of counsel" and cites the seminal case of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In raising a challenge of ineffective assistance of counsel based on the absence of work focused on the penalty phase, the Appellant's Brief in the habeas corpus case includes the following discussion:

> Charles Russell Rhines' counsel failed to investigate his background for mitigation evidence . . . The issue in this case was whether a death sentence would be imposed. Therefore, attention should have been given to the collection of mitigation evidence. That is evidence to be presented at the penalty phase of trial, to show why Charles Russell Rhines should live. . . . The billing records for Charles Russell Rhines' attorneys showed that only a cursory amount of work was devoted to mitigation witnesses . . . Besides background work, other things were not done by the attorneys in this case. These have been discussed before, but tie into the claim that no mitigation work was done. . . . At the deposition of Michael Butler, the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, were put into evidence. Most of Michael Butler's testimony as to what should have been done in mitigation, was based on what these guidelines recommend.

Appellant's Brief dated December 10, 1998 at 34-35 (citations omitted). The Appellant's Brief then quotes from the

American Bar Association Guidelines for the appointment and performance of counsel in death penalty cases, which includes in guideline 11.8.6 the following:

> a. Counsel should present to the sentencing entity or entities all reasonable available evidence in mitigation unless there is strong strategic reasons to forego some portion of such evidence.
>
> c. Counsel should consider all potential methods of offering mitigating evidence to the sentencing entity or entities, including witnesses, Affidavits, reports . . . letters and public records.

The Appellant's Brief in the State habeas corpus case concludes one section with the following presentation:

> In spite of the above concerns, very little attempt was made to put in other information contained in the guidelines. . . . In conclusion, in this case, things were not done and not attempted to be done. . . . An effective attorney should have done these things. They were not done. Therefore, Charles Russell Rhines asks that this Court find there was ineffective assistance of counsel.

Habeas Corpus Brief dated December 10, 1998 at 37.

The State probably will assert that Ground 9.B. is not exhausted because Ground 9.B. is expressed differently than how this issue was argued on appeal of the State habeas corpus case. If this indeed is the argument of the State, the State is taking a far too technical view of the exhaustion requirement. The purpose of exhaustion is not creation of procedural hurdles, but simply to afford first to the State a meaningful opportunity to consider allegations of legal error. *Vasquez v. Hillary,* 474 U.S. 254, 257, 106

S.Ct. 617, 620, 88 L.Ed.2d 598 (1986). In *Vasquez,* the United States Supreme Court held that presentation of additional facts to the District Court did not evade the exhaustion requirement, when the prisoner had presented the substance of the claim previously to state courts. *Vasquez,* 474 U.S. at 257-58, 106 S.Ct. at 620.[1]

The United States Supreme Court in *Sanders v. United States,* 373 U.S. 1, 83 S.Ct. 1068 (1963), discussed when in the habeas context grounds in a Petition are functionally the same. In *Sanders,* the Supreme Court reasoned as follows:

> But a claim of involuntary confession predicated on alleged psychological coercion does not raise a different "ground" than does one predicated on alleged physical coercion. In other words, identical grounds may often be proved by different factual allegations. So also, identical grounds may often be supported by different legal arguments, or vary in material respects. Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant.

Sanders, 373 U.S. at 16, 83 S.Ct. at 1077 (citations omitted); *see also Picard v. Connor,* 404 U.S. 270, 277, 92 S.Ct.

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[1] In *Vasquez,* the District Court requested that the Respondent supplement and clarify the record by presenting additional information and data on African American service on grand juries in King County, California That information then led to grant of the Petition For Writ of Habeas Corpus. Notwithstanding the presentation of additional statistical and supplemental evidence, the Court in *Vasquez* concluded that the additional information "did not-fundamentally alter the legal claim already considered by the State Courts." *Vasquez,* 474 U.S. at 260, 106 S.Ct. at 622.

509, 513, 30 L.Ed.2d 438 (1971) (recognizing instances where ultimate question for disposition on habeas corpus case will be the same despite variations in the legal theory or factual allegations urged in its support); *see also Hill v. Lockhart,* 28 F.3d 832, 835 (8th Cir. 1994) *cert. denied,* 513 U.S. 1102. Accordingly, the fact that there may be some variance or greater precision in how petitioner is presenting the claim under Ground 9.B. is not fatal to its presentation. The substance of Ground 9.B. – addressing the ineffective assistance of counsel in doing utterly insufficient work to formulate an effective penalty phase presentation – has been exhausted.

The State in its First Motion to Dismiss challenges Ground 9 H, I, and J. In the Statement of Exhaustion to Ground 9, Petitioner indicated that the issues listed as A through G were explicitly raised in the habeas corpus proceeding. The matters listed as H, I, and J are elaborations on Ground 1.I. of the Habeas Corpus Petition. Ground H, I, and J are part of the same argument for ineffective assistance of counsel under the *Strickland* test, but represent variations and elaborations on factual information previously presented. As such, Ground 9 H, I, and J do not fundamentally alter the legal claim already considered by the State Court's on ineffective assistance of counsel and should not subject the First Amended Petition For Habeas Corpus to dismissal. *See Hill v. Lockhart,* 28 F.3d 832, 835 (8th Cir. 1994), *cert. denied,* 513 U.S. 1102.

10. *The rights of Mr. Rhines to due process, equal protection under law, and to be free from cruel and unusual punishment were violated by the Court's errors in proportionality review and review of whether imposition of the death penalty was under passion, prejudice or other factors.*

The State in its First Motion to Dismiss contends that Ground Ten was not exhausted, and in its Second Motion to Dismiss contends that there is no federal issue raised by Ground Ten. Because of the scope contemplated by the Court for this Traverse, only the First Motion to Dismiss is considered here.[2]

There is no question that the factual substance of Ground Ten was presented on direct appeal. Indeed, Petitioner addressed how application of the death penalty to him was disproportionate. *Appellant's Brief* dated June 23, 1994 at 117-122; *Appellant's Proportionately* [sic] *Review Brief* dated January 18, 1995 at pp. 3-21; *Appellant's Proportionality* [sic] *Review Reply Brief* dated March 3, 1999 at pp. 3-10. In Appellant's Brief, Rhines referred to the Eighth Amendment to the United States Constitution nine times with respect to discussing the handling of the death penalty imposition, and repeatedly referred to the Fourteenth Amendment to the United States Constitution in making such arguments. *Appellant's Brief* dated June 23, 1994 at pp. 45, 46, 49, 51, 79, 82, 111, 112, and 113.

Specifically with respect to proportionality review, Petitioner cited three cases that discuss proportionality in the context of the Eighth Amendment prohibition against cruel and unusual punishment. Petitioner first cited *State*

[2] Petitioner objects to the Second Motion to Dismiss, for reasons that the due process and equal protection provisions of the Fourteenth Amendment and the cruel and unusual punishment protection under the Eighth Amendment are implicated by errors in review of whether the death penalty is being applied proportionately in South Dakota. *See Penmen v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

v. Marshall, 613 A.2d 1059 (N.J. 1992). *Appellant's Brief* dated June 23, 1994 at 119-121; *Appellant's Proportionality Review Brief* at 4-6,10, 18.

As if the South Dakota Supreme Court could not appreciate the inherent Eighth Amendment issue of cruel and unusual punishment in doing an appropriate proportionality review, the citation to *State v. Marshall,* 613 A.2d 1059 (N.J. 1992) would alert the South Dakota Supreme Court to such an issue. In *State v. Marshall,* the New Jersey court cited essentially every recent seminal case from the United States Supreme Court discussing cruel and unusual punishment in the context of the death penalty. The *Marshall* case included in its discussion the following Eighth Amendment authority:

1. *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Eighth Amendment prohibition against cruel and unusual punishment invalidates Georgia death penalty statute);

2. *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (Eighth Amendment review of Texas death penalty statute);

3. *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (Eighth Amendment review of the Florida death penalty statute);

4. *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (Eighth Amendment review of the Georgia death penalty statute);

5. *Pulley v. Harris,* 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984);

6. *Stanford v. Kentucky,* 492 U.S. 361, 109 S.Ct. 2969, 106 L.Ed.2d 306 (1989) (death penalty imposition on minors and Eighth Amendment ramifications);

7. *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (Eighth Amendment ramifications of death penalty imposition on mildly retarded);

8. *Coker v. Georgia,* 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977);

9. *Edmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982);

10. *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982);

11. *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983);

12. *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978);

13. *McCleskey v. Kemp,* 41 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987).

State v. Marshall, 613 A.2d 1059, 1066-1108 (N.J. 1992).

Petitioner next cited the case of *Commonwealth v. Frey,* 475 A.2d 700 (Pa. 1984) in its briefing. *Appellant's Brief* dated June 23, 1994 at 120; *Appellant's Proportionality Review Brief* dated January 18, 1995 at 5. The *Frey* case likewise cited many of the same cases, including *Zant, Lockett, Gregg,* and *Jurek,*[3] among a couple of additional cases from the United States Supreme Court evaluating death sentences under the Eighth Amendment protection

[3] Full citations for these cases appear on pages 20 of this Traverse.

against cruel and unusual punishment. *Frey,* 475 A.2d at 704-710.

Finally, Petitioner cited *State v. Rupe,* 743 P.2d 210 (Wash. 1987), specifically referring the Court to page 229. *Appellant's Brief* dated June 23, 1994 at 120; *Appellant's Proportionality Review Brief* dated January 18, 1995 at 6. On page 229, the *Rupe* decision cites to three cases from the United States Supreme Court involving the Eighth Amendment and discussions of the prohibition against cruel and unusual punishment as it applies to imposition of the death penalty. The three United States Supreme Court cases cited on page 229 in the *Rupe* decision are *Pulley, Zant,* and *Lockett.*[4] *Rupe,* 743 P.2d at 229.

The United States Court of Appeals for the Eighth Circuit has recognized that a petitioner may satisfy the exhaustion requirement by reference to *either* "a federal constitutional case, or a state case raising a pertinent federal constitutional issue." *Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir, 1988). As if the South Dakota Supreme Court needed to be reminded of the implications of the Eighth Amendment in doing a proportionality review of the imposition of the death penalty, Petitioner discharged any responsibility to alert the Supreme Court as to the constitutional dimensions of his proportionality argument through the citations to *Marshall, Frey,* and *Rupe.*

11. *Ground Eleven:*

The Due Process Rights and Right to Adequate Assistance of Counsel of Rhines were violated by the refusal of the trial court to appoint a forensic communication expert.

[4] Full citations for these cases appear on page 20 of this Traverse.

The State in its first Motion to Dismiss does not challenge the fact that this ground has been exhausted.

12. *Ground Twelve:*

The due process and equal protection rights of Mr. Rhines were violated by various acts of prosecutorial misconduct.

The State challenges this ground in its First Motion to Dismiss. Petitioner in his First Amended Petition For Writ of Habeas Corpus recognized with respect to Ground Eleven that, other than the prosecution tactic of eliminating all jurors with scruples or misgivings about the death penalty, the other instances of prosecutorial misconduct had not previously been raised.

13. *Ground Thirteen:*

The Fifth, Sixth, and Fourteenth Amendment Rights of Mr. Rhines were violated as a result of the failure to have Mr. Rhines present or allow hint to participate in the handling of the jury note and response to the jury note.

The State challenges Ground Thirteen as not having been exhausted in its first Motion to Dismiss. In the First Amended Petition For Writ of Habeas Corpus, Petitioner recognized that, while issues surrounding the handling of the jury note had been raised on direct appeal and in the habeas corpus case, this precise claim had not previously been raised.

III. CAUSE AND PREJUDICE

A. Cause and Prejudice Standard.

The United States Supreme Court first articulated the "cause and prejudice" standard in *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The United States Supreme court in *Wainwright* specifically stated: "We leave open for resolution and future decisions the precise definition of the 'cause' – and – 'prejudice' standard." *Id.* at 87, 97 S.Ct. at 2507.

Since the decision in *Wainwright,* the United States Supreme Court repeatedly has emphasized the need for flexibility in applying the "cause" prong of the cause and prejudice test. *Amadeo v. Zant,* 486 U.S. 214, 219, 108 S.Ct. 1771, 1775, 100 L.Ed.2d 249 (1988). In *Reed v. Ross,* 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed.2d 1 (1984), the Court discussed the cause prong as follows:

> Because of the broad range of potential reasons for an attorney's failure to comply with a procedural rule, and the virtually limitless array of contexts in which a procedural default can occur, this Court has not given the term "cause" precise content. Nor do we attempt to do so here. Underlying the concept of abuse, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel, and that defense counsel may not flout state procedures and then turn around and seek refuge in federal court from the consequences of such conduct. A defense attorney, therefore, may not ignore a State's procedural rules in the expectation that his client's constitutional claims can be raised at a later date in Federal court. Similarly, he may not use the

> prospect of federal habeas corpus relief as a hedge against the strategic risks he takes in his client's defense in State court.
>
> * * *
>
> On the other hand, the cause requirement may be satisfied under certain circumstances when a procedural failure is not attributable to an intentional decision by counsel made in pursuit of his client's interest.

Reed, 468 U.S. at 13-14, 104 S.Ct. at 2909 (citations omitted); *see also Amadeo v. Zant,* 486 U.S. 214, 219, 108 S.Ct. 1771, 1775, 100 L.Ed.2d 249 (1988).

The "principal concerns" behind the cause and prejudice standard are to prevent sandbagging and deliberate bypass of state procedures. *Amadeo v. Zant,* 486 U.S. 214, 219, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988); *see also Reed v. Ross,* 468 U.S. 1, 13-14, 104 S.Ct. 2901, 2909, 82 L.Ed.2d 1, ___ (1984).

Ineffective assistance of counsel is cause justifying procedural default under the cause and prejudice standard. *Coleman v. Thompson,* 501 U.S. 722, 754, 111 S.Ct. 2546, 2567, 115 L.Ed.2d 640 (1991); *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986); *Dawan v. Lockhart,* 980 F.2d 470, 473 (8th Cir. 1992).

B. Motion For Additional Time.

As described in the separate Motion filed herewith, the United States Supreme Court has before it for decision a case that will affect whether and how Petitioner presents cause and prejudice arguments with respect to the unexhausted claims – Ground 2.B., Ground 6.E., Ground

12, and Ground 13. Petitioner requests that the court grant Petitioner an extension to brief cause and prejudice issues as sought in the separately filed Motion.

IV. CONCLUSION

For the reasons contained herein, Petitioner requests that the Court denied the State's First Motion to Dismiss and find all grounds raised in the First Amended Petition to be exhausted.

V. REQUEST FOR ORAL ARGUMENT

Petitioner requests oral argument under Local Rule 7.1 on all issues of exhaustion of claims.

Dated at Sioux Falls, South Dakota, this 16th day of April, 2001.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	CIV. 00-5020-KES FINAL TRAVERSE (Filed Aug. 1, 2001)

Petitioner, Charles Russell Rhines, by and through his court-appointed attorneys, John A. Schlimgen and Roberto A. Lange, has received from the court its Order granting the Petitioner until July 23, 2001, to file its final traverse in this matter.

Petitioner has filed a traverse which covers almost all of the grounds raised in the Amended Petition for Habeas Corpus. Petitioner's position is that those grounds are, under applicable federal case law, exhausted.

There are four grounds raised in the Amended Petition for Habeas Corpus which are not exhausted under applicable case law at this time. Those grounds are 2B (exclusion of perspective juror, Jack Meyer); 6E (unconstitutionality of South Dakota capital statute and application); 12 (prosecutorial misconduct); and 13 (lack of presence of Petitioner at the time of the jury note and response was handled by the trial court).

Petitioner recognizes that the rule of *Rose v. Lundy*, 456 U.S. 953, 102 S.Ct. 2026, 72 L.Ed.2d 478 (1982) requires that a petition that contains both exhausted and unexhausted crimes be either dismissed, or the exhausted claims be excised from the petition. However, there are exceptions to this rule. In *Simmons v. Lockhart*, 915 F.2d 372 (8th Cir. 1990), the Eighth Circuit held that a mixed petition can be held in abeyance pending exhaustion. In *Simmons*, the issue was whether counsel's failure to file a State post conviction relief petition constituted sufficient cause for a petitioner's failure to raise a claim in State Court. The *Simmons* court held that it did constitute sufficient cause.

After Petitioner had filed his Amended Petition for Writ of Habeas Corpus, the South Dakota Supreme Court decided *Jackson v. Weber*, 2001 S.D. 30. In *Jackson*, the South Dakota Supreme Court recognized the right under South Dakota law to affective [sic] assistance of counsel during a habeas proceeding.

Although not phrased under the guise of ineffective assistance of counsel claims, all four of the unexhausted claims are in the status of being unexhausted solely for the reason that trial counsel failed to present them to any of the South Dakota courts. Under *Simmons*, this does constitute sufficient cause. Under *Jackson*, Petitioner has a form [sic] to hear the matter. Consequently, under *Simmons*, this court need not apply the rule of *Rose v. Lundy* in this case.

Dated this 23 day of July, 2001.

STUART, GERRY &
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/s/ [Illegible]
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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, v. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	CIV. NO. 00-5020-KES REPLY TO PETITIONER'S FINAL TRAVERSE (Filed Aug. 17, 2001)

The parties have filed several documents in this matter in accordance with the Court's procedural orders. It appears that the pleadings in this matter on file at this time include the following:

1. The first amended petition for writ of habeas corpus and statement of exhaustion, filed by Petitioner.

2. State's response to procedural order and motion to dismiss, filed by the Petitioner.

3. Petitioner's partial traverse to State's response and motion to dismiss, filed by the Petitioner.

4. State's reply to partial traverse, filed by the Respondent.

5. Petitioner's final traverse, dated July 23, 2001, and received by Respondent's counsel on July 25, 2001.

This document is intended as a reply to the Final Traverse, but also as a clarification of some of the earlier filings in light of case law developments in both

state and federal court. At this point, it would appear that the State has responded to both the initial habeas corpus petition (although the response was procedural in nature in accordance with the Court's orders) and to the partial traverse.

The prior filings of the parties make it clear that there is disagreement on the subject of which issues have been appropriately raised in the state courts. Petitioner contends that there are only four grounds that have not been so raised, including: (1) exclusion of prospective juror Jack Meyer, (2) unconstitutionality of South Dakota death penalty and its application, (3) prosecutorial misconduct, and (4) failure of Petitioner to be present at the time the jury note response was ruled upon. The State has identified additional issues, including: (1) an equal protection issue on prospective juror Diane Staeffler, (2) the State's use of peremptory challenges as equal protection, Fifth and Eighth Amendment claims; (3) equal protection argument on victim impact testimony; (4) ineffective assistance in the presentation of evidence at the penalty phase; (5) ineffective assistance grounds H (Glenn Wishard testimony), I (not hiring a "mitigation expert"), and J (allegedly irrelevant testimony about a gun and the victim's funeral); (6) proportionality review as a federal constitutional issue. These issues are all identified in the prior filings, but are repeated here only to place the matter in appropriate context.

In reply, the State would make several arguments as follows:

1. Respondent continues to contend that, in line with prior filings, the issues not raised in state court are procedurally defaulted, and, therefore, should be denied.

Petitioner can show no cause and prejudice for not raising them previously. As indicated, the case of *Coleman v. Thompson*, 501 U.S. 722 (1991) precludes a finding of cause and prejudice based on ineffective assistance of counsel during State habeas corpus proceedings. Therefore, if, in fact, these issues are procedurally defaulted, cause cannot arise from the alleged failings of Petitioner's habeas counsel. Since all these issues, at least theoretically, could have been raised in State habeas proceedings, no cause and prejudice from any ineffectiveness of state habeas counsel can arise.

2. In spite of the case of *Jackson v. Weber*, 2001 S.D. 30, 623 N.W.2d 71, reh'g granted, April 18, 2001, Petitioner's unraised issues are still procedurally defaulted. This is true for at least three reasons. First, since the rehearing has been granted, *Jackson* does not govern any proceedings until it is finally decided by the South Dakota Supreme Court. It has no precedential value before that. Second, in order for Petitioner to benefit in from *Jackson v. Weber*, he would need to be claiming ineffective assistance of his habeas counsel. Petitioner admits at page two of his Final Traverse, however that his issues are not "phrased under the guise of ineffective assistance of counsel." Therefore, those issues would not implicate ineffective assistance of counsel and could not lead to relief, even under *Jackson v. Weber*. Third, under previously cited case law, (*Ashker*; *Novaock*) it would be futile to return to state court.

3. Respondent has previously argued that the issues are exhausted, because they are procedurally defaulted. Petitioner argues, however, that a forum in State court remains because of the *Jackson* case. *Jackson* governs nothing at this time, since it is not final. Should the South

Dakota Supreme Court, however, decide that second or repeat petitions can be brought, and should it appear that the issues are unexhausted for that reason, the State *does not* waive the applicability of the exhaustion doctrine. We would preserve that issue, but only if it is found that the issues are not procedurally defaulted.

5. In all other respects, the State reasserts the matter contained in its two prior filings, State's Response to Procedural Order and Motion to Dismiss; and State's Reply to Partial Traverse.

6. Under *Duncan v. Walker*, 121 S.Ct. 2120, there is a price to be paid for failure to raise issues in State Court when the opportunity exists. The purpose of the statute of limitations under the AEDPA found at 28 U.S.C. § 2244(d) is to promote finality of State court criminal cases, as well as to promote comity and respect for the separate sovereignty of the states within the federal system. *Duncan*, 121 S.Ct. at 2127. By requiring full exhaustion, and at the same time strictly enforcing the one-year statute of limitations, there will be finality to state convictions to a much greater degree. The exhaustion requirement itself, according to *Rose v. Lundy*, 455 U.S. 509, 518-19 (1982) will encourage state prisoners to seek full relief from the State courts. This will give state courts the opportunity to review all claims of constitutional error. The requirement is designed principally to protect the State courts' role in the enforcement of federal law and to prevent disruption of state judicial proceedings. The statute of limitations was interpreted in *Duncan*, 121 S.Ct. at 2129 as tolling the one-year requirement only when State Court proceedings are being pursued.

7. Plaintiff's premise in the "Final Traverse" is that the rule of *Rose v. Lundy*, 455 U.S. at 520 requiring either complete exhaustion, dismissal or waiver of unexhausted claims, need not be applied because of Eighth Circuit case law. Aside from the fact that United State Supreme Court case law obviously trumps Eighth circuit case law, the case Respondent cites, *Simmons v. Lockhart*, 915 F.2d 372 (8th Cir. 1990) was actually overruled by the later case of *Victor v. Hopkins*, 90 F.3d 276, 282 (8th Cir. 1996), *reh'g and suggestion for reh'g en banc denied*, October 1, 1996, *cert. denied*, 519 U.S. 1153 (1997). Petitioner claims that under *Simmons*, this court may hold a case in abeyance during state court exhaustion of remedies. This course of action, however, is *specifically* prohibited in *Victor*, 90 F.3d at 282: "Accordingly we hold that the district court has no authority to hold Victor's mixed petition in abeyance or to maintain the stay of execution. The choices stated in *Rose v. Lundy* are the only options available to a habeas petitioner." The Eighth Circuit explained its reason for so ruling, including its that the *Simmons* holding is contrary to the Supreme Court's explicit directions in *Rose*. It is also inconsistent with the Supreme Court's cases post *Rose*. *Victor*, 90 F.3d at 282. It is to be noted that *Victor*, like this case, was a death penalty case.

Under Eighth Circuit case law, this Court cannot hold the matter in abeyance. If Petitioner wishes to further exhaust State remedies, the matter must be dismissed in accordance with *Rose v. Lundy*. If Petitioner wishes to proceed on only exhausted claims, then he must so elect, and those not pursued would probably be regarded as waived.

8. Respondent realizes that *Victor v. Hopkins* was decided before applicability of the statute of limitations

discussed in *Duncan v. Walker*. Respondent also acknowledges that the concurrence and the dissent in *Duncan v. Walker* addressed concepts of equitable tolling, and of holding a case in abeyance in spite of *Rose v. Lundy*. The majority did not adopt the suggestions in the concurrence and dissent that cases can be held in abeyance or "equitably tolled." While those doctrines are not specifically addressed in the majority in *Duncan*, 121 S.Ct. at 2129, it is apparent from the language contained at 121 S.Ct. 2127-28 that the court would probably find that such tolling or holding in abeyance undermines the purposes of the statute of limitations.

Respondent recognizes that Petitioner faces a difficult choice at this point in the litigation. If he blames his state habeas attorney for not bringing up certain issues, it will not help him in federal court. This is because under *Coleman v. Thompson*, any ineffective assistance on state habeas cannot be cause to overcome a state court procedural default. If Petitioner, on the other hand, wishes to return to State court to exhaust and thus has his mixed petition dismissed, he may be unable to refile in federal court due to the statute of limitations as interpreted in *Duncan*. This choice, however, merely illustrates the fact that federal habeas law exacts a price when the petitioner fails to raise issues at the first opportunity in the state courts. Habeas, it has been observed, is a civil case, and the risk of bad attorney representation rests with the party being represented, not with the opposition. Petitioner's attorney is his agent, and he bears the risk of attorney error. *See Coleman*, 501 U.S. at 752-53. While Respondent does not acknowledge that representation on State habeas was ineffective, Petitioner is entitled to no relief in federal court even if it was. *Id.* Petitioner still may assert defaulted claims in federal court if there is cause

and prejudice or if he were able to show that he is actually innocent of the crime. It appears that Petitioner may not be able to assert in federal court claims that were not raised for the first time in State court. This is not unjust. It is the natural, logical, and inevitable consequence of requiring both that Petitioner raise his issues for the first time in State court and that he bring any issues to federal court within one year after State conviction, less the time necessary to pursue State remedies.

CONCLUSION

The State hereby requests that it be granted dismissal in accordance with its initial filing in this matter, or, in the alternative, that this matter be dismissed without prejudice if it is found to contain unexhausted claims. Respondent also requests that all procedurally defaulted claims be dismissed on the merits and with prejudice.

Dated this 16th day of August, 2001.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	)	Civ. 00-5020-KES ORDER (Filed Dec. 11, 2001)

Respondent moves for an extension of time to file his brief. Petitioner has no objection. Good cause appearing, it is hereby

ORDERED that respondent shall file his brief by December 13, 2001.

Dated December 11, 2001.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	)	Civ. 00-5020-KES ORDER (Filed Jul. 03, 2002)

Petitioner, Charles Rhines, filed a petition for writ of habeas corpus alleging thirteen general grounds for relief. Douglas Weber, respondent, alleges that several of the grounds raised by petitioner have not been exhausted and are, therefore, procedurally defaulted and must not be considered by this court.

FACTS

Petitioner was convicted of premeditated first-degree murder and third-degree burglary. On January 26, 1993, a jury sentenced him to death by lethal injection, and the judgment was entered on January 29, 1993. Petitioner appealed his conviction and sentence to the South Dakota Supreme Court. Fourteen issues were raised during his direct appeal, including the excuse of prospective juror Diane Staeffler, the state's use of their peremptory challenges, the use of victim impact testimony, and the proportionality review. The South Dakota Supreme Court affirmed petitioner's conviction and sentence and the United States Supreme Court denied further review on

December 2, 1996. Petitioner then filed an application for writ of habeas corpus in state court on December 5, 1996. In his state habeas, petitioner raised numerous issues, including ineffective assistance of counsel, excusing prospective juror Diane Staeffler, and the constitutionality of the South Dakota capital punishment statutes. His habeas was denied by the trial court on October 8, 1998. The South Dakota Supreme Court denied his appeal on February 9, 2000. On February 22, 2000, petitioner filed this application for writ of habeas corpus in federal court.

DISCUSSION

A. Exhaustion

Before a claim for relief in a habeas petition may be considered by this court, the petitioner must have exhausted his state remedies. "[T]he state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan v. Boerckel,* 526 U.S. 838, 842 (1999). A claim is not exhausted unless the same factual arguments and legal theories are presented in both the state and federal claims. *See Kenley v. Armontrout,* 937 F.2d 1298, 1302 (8th Cir. 1991). "This means that the federal claim should not present significant additional facts such that the claim was not fairly presented to the state court." *Id.* (citing *Stranghoener v. Black,* 720 F.2d 1005, 1007-08 (8th Cir. 1983)).

The Eighth Circuit Court of Appeals has determined that a petitioner has fairly presented a federal claim to the state courts if he refers to "'a specific federal constitutional right, a particular constitutional provision, a federal constitutional case, or a state case raising a pertinent

federal constitutional issue' in a claim before the state courts." *Kelly v. Trickey,* 844 F.2d 557, 558 (8th Cir. 1988) (quoting *Thomas v. Wyrick,* 622 F.2d 411 (8th Cir. 1980)). Thus, we must examine the contested grounds of relief to determine if the same factual and legal arguments raised in the federal petition were presented in the state courts and whether petitioner met the requirements of *Kelly.*

The first ground that respondent challenges is Ground Two (A) in which petitioner contends that his equal protection rights were violated by the exclusion of Diane Staeffler as a juror. On page 29 of his direct appeal brief, petitioner argued that the South Dakota Supreme Court should apply the standard in *Witherspoon v. Illinois,* 391 U.S. 510 (1968). *Witherspoon* specifically references the protections of the Sixth and Fourteenth Amendments. On page 41 of his brief on direct appeal, petitioner also cited to *Davis v. Georgia,* 429 U.S. 122 (1976), and *Gray v. Mississippi,* 481 U.S. 648 (1987). These cases discuss the protections of the Sixth and Fourteenth Amendments. Moreover, the South Dakota Supreme Court directly reached this issue when it found that "[b]oth the United States and South Dakota Constitutions guarantee trial by an impartial jury. (cites excluded) (holding the Sixth and Fourteenth Amendments to the United States Constitution require the 'impartiality of any jury that will undertake capital sentencing')." *See State v. Rhines,* 548 N.W.2d 415, 430, 1996 SD 55 (S.D. 1996). Petitioner has met the requirements of *Kelly* and therefore, this claim has been exhausted.

Respondent next challenges Ground Three, which alleges that petitioner's rights to due process, an impartial jury, and equal protection of the law were violated by the manner in which the state used their peremptory

challenges. Respondent acknowledges that the Sixth Amendment grounds were raised in state court, but contends that the equal protection, Fifth and Eighth Amendment grounds, were not exhausted. Petitioner agrees that he is not raising an Eighth Amendment challenge here. Petitioner raised the equal protection and Fifth Amendment issues in his direct appeal to the state supreme court when he argued at page 42 of his brief that "*Witherspoon* makes clear that excluding such jurors for cause denies a defendant's due process right to an impartial jury." By referring to *Witherspoon,* which discusses the Sixth and Fourteenth Amendments, and arguing to the South Dakota Supreme Court that his due process tight to an impartial jury was violated, petitioner has given the state courts the opportunity to review these claims and has met the *Kelley* requirements for exhaustion.

Respondent next challenges Ground Four, wherein petitioner claims that his rights to due process and equal protection were violated by the use of victim impact testimony. On page 55 of his direct appeal brief, petitioner argued that the victim impact testimony was not admissible and cited *Booth v. Maryland,* 482 U.S. 496 (1987). *Booth* discusses the application of the Eighth Amendment to the states through the Fourteenth Amendment. *See* 482 U.S. at 500 n.5. "Citation to a provision of the federal constitution or a case addressing the constitutional basis of the claim, or a discernible reference to a federal constitutional right is all that is normally required." *Graham v. Solem,* 728 F.2d 1533, 1535-36 (8th Cir. 1984). Thus, petitioner has fairly presented this claim to the state courts.

Petitioner alleges in Ground Nine that his Fifth Amendment right to due process and his Sixth Amendment right to assistance of counsel were violated due to the ineffective assistance of his trial counsel. Respondent contends that petitioner failed to raise in state court the specifics of the claim that petitioner is now raising, namely that his trial counsel was ineffective when he failed to call John Fousek, James Mighell, and Connie Royer as witnesses during the penalty phase. The record discloses that during his habeas proceedings, petitioner argued that his counsel was ineffective for failing to investigate mitigation evidence. Petitioner cited *Strickland v. Washington,* 466 U.S. 668 (1984) and the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases were admitted into evidence. The ABA Guidelines discuss the presentation of mitigation evidence and the calling of witnesses during the sentencing phase.

The United States Supreme Court has held that "the substance of a federal habeas corpus claim must first be presented to the state courts." *Picard v. Connor,* 404 U.S. 270, 278 (1971). The Eighth Circuit Court of Appeals has concluded that the courts "may review claims as long as they are closely related to claims presented to the lower courts, but . . . have required at least an 'arguable factual commonality.'" *Kenley v. Armontrout,* 937 F.2d 1298, 1303 (8th Cir. 1991) (quoting *Bolder* 921 F.2d at 1364 n.9). While petitioner presented the legal substance of his claim to the state court, he did not present the same factual argument to the state court. As a result, the court finds that this claim (Ground Nine(B)) was not fairly presented to the state courts and has not been exhausted.

Respondent also contends that petitioner failed to raise in state court that his counsel was ineffective due to the failure to correct false testimony from Glen Wishard, the failure to hire or consult with a mitigation expert, and the failure to object to the admission of petitioner's statement that he had access to a gun (Grounds Nine (H), (I), and (J)). These claims were not fully and fairly presented to the state court. Though the state habeas petition focused on the failure to investigate mitigation evidence, petitioner did not present the significant facts now alleged in the federal habeas petition to the state court. As a result, these claims (Grounds Nine (H), (I), and (J)) have not been exhausted.

Ground Ten alleges that the proportionality review conducted by the state court violated petitioner's due process, equal protection, and Eighth Amendment rights. Respondent contends that this ground is also unexhausted. In his direct appeal brief, petitioner cited three cases that discuss proportionality in the context of the Eighth Amendment prohibition against cruel and unusual punishment *State v. Marshall,* 130 N.J. 109, 613 A.2d 1059 (N.J. 1992); *Commonwealth v. Frey,* 504 Pa. 428, 475 A.2d 700 (Pa. 1984); and *State v. Rupe,* 108 Wash. 2d 734, 743 P.2d 210 (Wash. 1987). *Marshall* cites every seminal case of the United States Supreme Court that discuss [sic] the Eighth Amendment implications in the context of the death penalty, including, in part, *Furman v. Georgia,* 408 U.S. 238 (1972), *Zurek v. Texas,* 428 U.S. 262 (1976), *Proffitt v. Florida,* 428 U.S. 242 (1976), *Gregg v. Georgia,* 428 U.S. 153 (1976), and *Pulley v. Harris,* 465 U.S. 37 (1984). *Frey* cites *Zant v. Stephens,* 462 U.S. 862 (1983), *Lockett v. Ohio,* 438 U.S. 586 (1978), *Gregg,* and *Jurek.*

Rupe cites *Pulley, Furman, Zant,* and *Lockett.* The reference to these cases satisfies the requirements of *Kelly.* The state courts, therefore, have been afforded the opportunity to review this claim and the court finds that Ground Ten has been exhausted.

The parties agree that there are four grounds that are raised in the First Amended Petition for Habeas Corpus which are not exhausted. These issues are Two(B), which alleges that the exclusion of Jack Meyer violated petitioner's rights to due process, an impartial jury and equal protection; Six(E), which alleges the unconstitutionality of the South Dakota capital punishment statute and its application; Twelve, which alleges the violation of petitioner's due process and equal protection rights due to prosecutorial misconduct; and Thirteen, which alleges violations of petitioner's Fifth, Sixth, and Fourteenth Amendment rights when a jury note was handled without petitioner's presence or participation. Petitioner alleges that the four grounds in question were not exhausted due to ineffective assistance of counsel.

B. Procedural Default

Respondent contends that the unexhausted claims are procedurally defaulted because petitioner would be barred from filing a successive state habeas petition under South Dakota law. In *Ashker v. Leapley,* 5 F.3d 1178, 1180 (8th Cir. 1993), the Eighth Circuit found that after it is determined that the petitioner failed to exhaust certain issues, then the court must determine whether non-futile state court remedies remain available to the petitioner. *Ashker* concluded that under South Dakota law, the petitioner "may file another petition for habeas relief in state court if

he can show reasonable cause for omitting or inadequately raising the . . . ground in his original petition." *Id.* at 1180 (citing SDCL 21-27-16.1). Petitioner alleges that he failed to raise these issues due to ineffective assistance of counsel on his habeas petition. He has not previously presented his ineffective assistance of counsel claim to the state court. The South Dakota Supreme Court has found that "an independent right to effective assistance of counsel arises by [state] statute in post-conviction hearing." *Jackson v. Weber,* 637 N.W.2d 19, 23 (S.D. 2001). Thus, based on this record, this court cannot determine that all state court remedies available to the petitioner would be futile. As a result, before this court can consider a claim of ineffective assistance of habeas counsel, petitioner must present his claim to the state court.

C. Stay of Proceedings

Petitioner requests that the court hold the petition in abeyance while his unexhausted claims are presented to state court. Previously, the Eighth Circuit has held that a court cannot hold petitioner's current petition for habeas in abeyance while the petitioner returned to state court to exhaust his claims. *See Victor v. Hopkins.* 90 F.3d 276, 282 (8th Cir. 1996). This decision, however, was handed down prior to the United States Supreme Court's decision in *Duncan v. Walker,* 533 U.S. 167 (2001). In *Duncan,* the Court determined that the filing of a federal petition for habeas corpus does not toll the statute of limitations under the Antiterrorism and Effective Death Penalty Act (AEDPA). As a result, if petitioner's federal habeas petition were to be dismissed after pending before this court for approximately sixteen months, petitioner would be precluded from federal review of his claims, including

those that are properly before this court at this time, due to the expiration of the statute of limitations under the AEDPA. It is with this type of situation in mind that Justices Souter and Stevens advanced the idea that nothing precludes the district courts from retaining jurisdiction over a habeas petition "when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1-year limitations period" and allowing a petitioner to return to state court to exhaust his claims. *Id.* at 183.

Other circuit courts have addressed the issue and approved of a district court staying a petition while the petitioner exhausts those claims determined to be improperly before the court. The First Circuit Court of Appeals "commend[s] such an approach . . . [when] the original habeas petition, though unexhausted, is timely filed, but there is a realistic danger that a second petition, filed after exhaustion has occurred, will be untimely." *Delaney v. Matesanz* 264 F.3d 7, 15 n.5 (1st Cir. 2001). The Second Circuit Court of Appeals has also advocated the staying of mixed petitions until the petitioner can exhaust all claims. *See Zarvela v. Artuz,* 254 F.3d 374, 380 (2d Cir. 2001). The Second Circuit also suggests, however, that time limits must be placed on the stay in order to prohibit excessive delays. *See id.* at 380-81. The Sixth Circuit Court of Appeals has adopted the approach of the Second Circuit, finding it "eminently reasonable." *Palmer v. Carlton,* 276 F.3d 777, 781 (6th Cir. 2002). This court also adopts the reasoning set forth in Justices Souter's and Stevens's concurring opinions in *Duncan* and in the opinions of the First, Second, and Sixth Circuit Courts of Appeal and will stay the petition while petitioner exhausts his claims.

Based on the foregoing discussion, it is hereby

ORDERED that respondents' motion to dismiss (Docket 77) is denied without prejudice.

IT IS FURTHER ORDERED that Grounds Two(A), Three, Four, and Ten have been exhausted and, therefore, will be considered on the merits.

IT IS FURTHER ORDERED that Grounds Two(B), Six(E), Nine(B), (H), (I) and (J), Twelve, and Thirteen are unexhausted. The petition for habeas corpus is stayed pending exhaustion of state court remedies of the claims stated in Grounds Two(B), Six(E), Nine(B) (H), (I) and (J), Twelve, and Thirteen, conditioned upon petitioner commencing state court exhaustion proceedings within sixty days of this order and returning to this court within sixty days of completing such exhaustion. If an action to exhaust state court remedies is commenced, petitioner shall immediately file a notice of such action with this court.

Dated July 3, 2002.

BY THE COURT:

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHARLES RUSSELL RHINES Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	Civ. No. 00-5020-KES NOTICE OF APPEAL (Filed Jul. 31, 2002)

Douglas Weber, Warden, South Dakota State Penitentiary, Respondent in the above-named matter, hereby gives notice that he appeals to the United States Court of Appeals for the Eighth Circuit from the Order of the United States District Court for the District of South Dakota, Western Division, entered by the Honorable Karen E. Schreier, and dated and filed July 3, 2002, on file herein. Respondent appeals from the whole of such Order.

For further identification, the Order appealed from is this Court's Docket No. 116 in the above-referenced case.

Dated this 31st day of July, 2002.

Respectfully submitted,

MARK BARNETT
ATTORNEY GENERAL

/s/ Craig M. Eichstadt
Craig M. Eichstadt
Deputy Attorney General
500 East Capitol Avenue
Pierre, South Dakota
57501-5070
Telephone: (605) 773-3215

[Certificate Of Service Omitted In Printing]

STATE OF SOUTH DAKOTA)		
) SS		IN CIRCUIT COURT
COUNTY OF PENNINGTON)		
* * * * * * * * * * * * * * * * * *	[]	
Charles R. Rhines,	[]	SEVENTH JUDICIAL CIRCUIT
Petitioner,	[]	
	[]	CIV. ___
vs.	[]	APPLICATION FOR A WRIT OF HABEAS CORPUS
Douglas Weber, Warden: South Dakota State Penitentiary,	[]	
Respondent.	[]	
* * * * * * * * * * * * * * * * * *	[]	

COMES NOW THE PETITIONER, Charles R. Rhines, IN THE ABOVE EN-titled action, requesting the Seventh Judicial Circuit Court for the State of South Dakota to grant the Petitioner a Writ of habeas corpus.

This action is brought pursuant to SDCL § 21-27; South Dakota habeas corpus and the holding by the South Dakota Supreme Court in the case of *Jackson v. Weber*, 2001 S.D. 136.

1. Petitioner is currently a prisoner in the South Dakota Department of Corrections.

2. Petitioner is under sentence of death entered on January 29, 1993 for a conviction of First Degree murder. (Copy of judgment is herewith attached)

3. Petitioner's conviction and sentence of death have been affirmed on appeal by the South Dakota Supreme Court: *State v. Rhines*, 1996 S.D. 55, 548 N.W. 2d 415; and the United States Supreme Court has declined to review the appellate judgement.

4. That the Officer by whom the Petitioner is so imprisoned and so restrained is Douglas Weber, Warden of the South Dakota State Penitentiary.

5. The Judgement of conviction and sentence of death and resulting restraint is illegal and unconstitutional for the following reasons:

A. Petitioner received Ineffective Assistance of counsel in his first South Dakota habeas corpus action through counsel's failure to raise several issues.

B. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of prospective juror Jack Meyer being dismissed from the jury pool due to his having scruples concerning the death penalty, in violation of the US Supreme Court holding in *Witherspoon v. Illinois.*

C. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the South Dakota Capital Punishment statutes unconstitutionallity [sic].

D. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of Petitioner's trial counsel's half-hearted, tepid presentation of evidence during the penalty phase of Petitioner's Capital trial by their failure to call available witnesses who would have provided helpful testimony for the Petitioner. These witnesses include but are not limited to: John Fousek, James Mighell, Connie Royer and Rick Walters.

E. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of Petitioner's trial counsel failing to catch and correct erroneous and false, yet highly predjudicial [sic] testimony from witness Glen Wishard.

F. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the Petitioner's trial counsel's failure to register objections to keep out irrelevant yet prejudicial testimony, such as the Petitioner having access to a gun and a statement by Petitioner at the victim's funeral.

G. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the prosecutor maintaining the victim's hands were tied prior to the fatal wound, when evidence was to the effect that they were tied afterwards.

H. Petitioner's South Dakota habeas corpus Counsel, Michael W. Hanson, failed to raise the issue of the prosecutor claiming that the defendant/petitioner had attempted to "gut or degut" the victim in the assault when there was no evidence to support such a claim.

I. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the prosecutor using and arguing from false erroneous testimony from Glen Wishard about the defendant/petitioner's demeanor in the several hours after the assault upon the victim.

J. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the prosecutor using the improper tactic of eliminating all jurors with misgivings or scruples about the imposition of the death penalty.

K. Petitioner's South Dakota habeas corpus counsel, Michael W. Hanson, failed to raise the issue of the note from the jury during penalty phase deliberations with myriad questions about the nature of life imprisonment and it's [sic] actual meanings, among other topics. Petitioner was not made aware of the existence of the jury note until after the jury had completed it's [sic] deliberations and had returned a verdict of death.

Further, Petitioner was not permitted to participate in, nor attend the discussion by counsel's and trial judge of what to do about the jury note.

L. There was no evidence presented nor was there any testimony given by any witness which laid a foundation for the jury to 'ask' the questions as stated in "k" above. Petitioner believes these questions came from extraneous information introduced to the jury after the conclusion of the trial.

The Petitioner prays the Court grant any and all relief he may be due in this matter and/or in the interests of justice, as the Court deems just and fair.

Dated this 3rd day of August, 2002 at Sioux Falls, South Dakota.

/s/ Charles R. Rhines
Charles R. Rhines,
Petitioner, Pro Se
P.O. Box 5911
Sioux Falls, SD 57117-5911

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Charles R. Rhines
Charles R. Rhines,
Petitioner

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT

CHARLES RUSSELL RHINES, Petitioner, vs. DOUGLAS WEBER, Warden, South Dakota State Penitentiary, Respondent.	CIV. #02-_____ CERTIFICATE OF SERVICE

The undersigned hereby certifies that true a copy of Application for a Writ of Habeas Corpus and Motion for Appointment of Counsel in the above matter were served by first-class mail, postage prepaid, upon the following:

Craig M. Eichstadt
Deputy Attorney General
Attorney General's Office
500 E. Capitol Avenue
Pierre, SD 57501-5070

Clerks Office
U.S. District Court
P.O. Box 6080
Rapid City, SD 57709-6080

Pennington County Clerk
of Courts
P.O. Box 230
Rapid City, SD 57709

Such service was made this 22 day of August, 2002.

STUART, GERRY &
SCHLIMGEN, Prof. LLC

By: /s/ John A. Schlimgen
JOHN A. SCHLIMGEN
Attorney for Petitioner
507 W. 10th Street
P.O. Box 966
Sioux Falls, SD 57101-0966
Telephone (605) 336-6400
Fax (605) 336-6842

United States Court Of Appeals

FOR THE EIGHTH CIRCUIT

No. 02-2990

Charles Russell Rhines, Petitioner-Appellee, v. Douglas Weber, Warden, South Dakota State Penitentiary, Respondent-Appellant.	*	Appeal from the United States District Court for the District of South Dakota **[PUBLISHED]**

Submitted: September 2, 2003

Filed: October 7, 2003

Before LOKEN, Chief Judge, BRIGHT and MURPHY, Circuit Judges.

PER CURIAM.

South Dakota inmate Charles Russell Rhines filed this petition for a writ of habeas corpus, alleging that numerous constitutional errors infected his 1993 first-degree murder conviction. The district court entered an order declaring that Rhines failed to exhaust some federal claims and that non-futile state court remedies may still be available to him. The court stayed all claims pending exhaustion of state court remedies for the unexhausted

claims. Warden Douglas Weber appeals. We have jurisdiction under the collateral order doctrine to review an interlocutory order holding a habeas petition in abeyance pending exhaustion of state court remedies. *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998).

This court has recently addressed the question whether habeas claims may be stayed while the habeas petitioner seeks state court remedies on claims that may be unexhausted. *Akins v. Kenney*, No. 02-1913, slip op. at 7-9 (8th Cir. Sep. 2, 2003). *Akins* precludes the district court from staying Rhines's exhausted claims while he seeks state post-conviction relief on other claims that may be unexhausted. However, *Akins* did not decide whether a petitioner may delete unexhausted claims while proceeding only on the claims he believes are fully exhausted. Nor did *Akins* preclude a petitioner from electing to forego further state court proceedings, in which case he would presumably proceed on all claims in the federal habeas action and contest any argument by respondent that the unexhausted claims are procedurally barred. These issues are better addressed initially in the district court. Accordingly, the district court's order of July 3, 2002 is vacated, and the case is remanded for further consideration.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 02-2990	*	
	*	
Charles Russell Rhines,	*	
	*	
Appellee,	*	Appeal from the
	*	United States District
vs.	*	Court for the District
	*	of South Dakota
Douglas Weber, Warden,	*	
South Dakota State Penitentiary,	*	
	*	
Appellant.	*	

JUDGMENT

(Filed: Dec. 3, 2003)

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is vacated and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

(5172-010199)

October 7, 2003

ORDER ENTERED IN ACCORDANCE WITH OPINION
/s/ Michael E. Gans
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 02-2990	*	
	*	
Charles Russell Rhines,	*	
	*	
Appellee,	*	Order Denying Petition
	*	for Rehearing and for
v.	*	Rehearing En Banc
	*	
Douglas Weber, Warden, etc.,	*	
	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

November 24, 2003

ORDER ENTERED IN ACCORDANCE WITH OPINION

/s/ Michael E. Gans

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

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548 N.W.2d 415

Supreme Court of South Dakota.

STATE of South Dakota, Plaintiff and Appellee,

v.

Charles Russell RHINES, Defendant and Appellant.

No. 18268.

Argued Oct. 18, 1995.
Decided May 15, 1996.
Rehearing Denied June 28, 1996.

Mark Barnett, Attorney General, Grant Gormley, Craig M. Eichstadt, and Sherri Sundem Wald, and Gary Campbell, Assistant Attorneys. General, Pierre, for plaintiff and appellee.

Michael Stonefield, Pennington County Public Defender's Office, Joseph M. Butler of Bangs, McCullen, Butler, Foye & Simmons, and Wayne F. Gilbert of Johnson Huffman, Rapid City, for defendant and appellant.

MILLER, Chief Justice.

From the latter part of 1991 through February 1992, Charles Russell Rhines worked at the Dig 'Em Donut Shop on West Main Street in Rapid City, South Dakota. In February 1992 Rhines was terminated from this job.

On March 8, 1992, the body of Donnivan Schaeffer, an employee of Dig 'Em Donuts, was found in the storeroom of the donut shop on West Main Street. Schaeffer's hands were bound, and he had been repeatedly stabbed. Approximately $3,300 in cash, coins, and checks was missing from the store. Additional facts will be recited herein as they relate to specific issues.

The State charged Rhines with third-degree burglary of the store and first-degree murder of Schaeffer. A jury convicted him of these crimes. The jury recommended a sentence of death for the first-degree murder conviction. The trial court entered a judgment and warrant of execution. Rhines appeals. We affirm.

ISSUE 1.

Did the trial court err by not suppressing incriminating statements made by Rhines to law enforcement officers on June 19 and 21, 1992?

At approximately 12:45 p.m. on June 19, 1992, Rhines was arrested in King County, Washington, for a burglary that occurred in that state. King County Police Officer Michael Caldwell read Rhines the following *Miranda* warning:

> You have the right to remain silent. Number 2, anything you say or sign can be used as evidence against you in a court of law. Number 3, you have the right at this time to an attorney of your own choosing, and to have him present before saying or signing anything. Number 4, if you cannot afford an attorney, you are entitled to have an attorney appointed for you without cost to you and to have him present before saying and signing anything. Number 5, you have the right to exercise any of the above rights at any time before saying or signing anything. Do you understand each of these rights that I have explained to you?

According to Officer Caldwell, Rhines responded by asking something to the effect, "Those two detectives from South Dakota are here, aren't they?" Caldwell made no reply. Caldwell did not attempt to question Rhines, and Rhines

made no further statements to Caldwell. Rhines was placed in a holding cell at a King County police station.

At 6:56 p.m. that same day, two South Dakota law enforcement officers, Detective Steve Allender of the Rapid City Police Department and Pennington County Deputy Sheriff Don Bahr, interrogated Rhines about the burglary of Dig 'Em Donuts and the murder of Schaeffer. Detective Allender testified that he advised Rhines of his *Miranda* rights prior to questioning him. The exchange between himself and Rhines is as follows:

> Allender: You have the continuing right to remain silent. Do you understand that?
>
> Rhines: Yes.
>
> Allender: Anything you say can be used as evidence against you. Do you understand that?
>
> Rhines: Yes.
>
> Allender: You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?
>
> Rhines: Yes.
>
> Allender: Having those rights in mind, are you willing to answer questions?
>
> Rhines: Do I have a choice?

Allender testified he told Rhines he did have a choice and in fact Rhines did not have to talk with them at all. Allender then asked if Rhines wanted to talk with them and Rhines said, "I suppose so," and then said, "I'll answer any questions I like." Shortly thereafter, Rhines confessed to

the burglary of Dig 'Em Donuts and to the killing of Schaeffer.

Approximately two hours later, Rhines gave the officers permission to tape record his statements. The following exchange occurred:

> Allender: Ok. Um, do you remember me reading you your rights?
>
> Rhines: Yes.
>
> Allender: In the beginning? Did you understand those rights?
>
> Rhines: Yes.
>
> Allender: And uh, having those rights in mind you talked to us here?
>
> Rhines: Yes I have.

During the taped portion of the interview, Rhines again made incriminating statements about the burglary of Dig 'Em Donuts and the killing of Schaeffer.

On June 21, 1992, Detective Allender and Deputy Sheriff Bahr posed additional questions to Rhines. This interview was tape recorded. Prior to questioning, Detective Allender had the following conversation with Rhines:

> Allender: You have the continuing right to remain silent, do you understand that?
>
> Rhines: Yes.
>
> Allender: Anything you say can be used as evidence against you. Do you understand that?
>
> Rhines: Yes.

> Allender: You have the right to consult with and have the presence of an attorney, and if you cannot afford an attorney, an attorney can be appointed for you free of charge. Do you understand that?
>
> Rhines: Yes.
>
> Allender: K. Just like the other night, having these rights in mind, are you willing to answer questions?
>
> Rhines: Yes.
>
> Allender: Ok. And that, in this case, it goes, if you don't like the question, it doesn't mean that you're supposed to answer it. You can always say stop, ok?
>
> Rhines: I can take the 5th Amendment.
>
> Allender: Exactly.

Rhines proceeded to make incriminating statements about the burglary of Dig 'Em Donuts and the death of Schaeffer.

Rhines filed a pretrial motion to suppress the incriminating statements made to the officers on June 19 and 21, 1992. After a hearing, the trial court denied this motion. At trial, Detective Allender testified regarding Rhines' statements during the untaped portion of the June 19, 1992, interview. Rhines entered a continuing objection to this testimony. Over Rhines' objection, the trial court also permitted the State to play the recordings of the interviews that took place on June 19 and 21, 1992. Rhines claims the trial court erred in admitting his statements.

Rhines argues the trial court erred in failing to suppress the incriminating statements he made during the June 19 and 21 interviews. He claims that the *Miranda* warnings recited to him were deficient for several reasons. He also asserts that he never gave a valid waiver of his

Miranda rights. We will consider each of his contentions in turn.

Preliminarily, we reiterate that the Fifth Amendment to the United States Constitution provides in part:

> No person . . . shall be compelled in any criminal case to be a witness against himself[.]

U.S. Const.Amend. V.[1] The Fifth Amendment privilege against self-incrimination is implicated whenever an individual is subjected to a custodial interrogation by the police. *Miranda v. Arizona,* 384 U.S. 436, 478, 86 S.Ct. 1602, 1630, 16 L.Ed.2d 694, 726 (1966). To protect the privilege, law enforcement personnel must observe certain procedural safeguards. 384 U.S. at 478-79, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. In the absence of other equivalent procedures, law enforcement must advise a suspect as follows:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726. If the individual indicates at any time before or during questioning that he wishes to remain silent or that he wants an attorney, the interrogation must end. 384 U.S. at 473-74, 86 S.Ct. at 1627-28, 16 L.Ed.2d at 723. If law enforcement fails to follow these or other equivalent procedures, the

[1] Article VI, § 9, of the South Dakota Constitution states in relevant part: "No person shall be compelled in any criminal case to give evidence against himself[.]"

prosecution may not use statements made during a custodial interrogation as proof of guilt. 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706.

Importantly, *Miranda* does not require that warnings be given in the exact form described in that decision. *Duckworth v. Eagan,* 492 U.S. 195, 202, 109 S.Ct. 2875, 2880, 106 L.Ed.2d 166, 176 (1989). "[T]he words of *Miranda* do not constitute a ritualistic formula which must be repeated without variation in order to be effective. Words which convey the substance of the warning along with the required information are sufficient." *Evans v. Swenson,* 455 F.2d 291, 295 (8th Cir.1972), *cert. denied,* 408 U.S. 929, 92 S.Ct. 2508, 33 L.Ed.2d 342 (1972) (citations omitted).

1. The right to terminate questioning.

Rhines contends Detective Allender's warnings on June 19 and June 21, 1992, failed to advise him of his right to terminate questioning at any time. Rhines further argues that Officer Caldwell's earlier recitation, which includes such a warning, cannot be combined with Detective Allender's advisement to arrive at a sufficient warning. Rhines reasons that, since he never told Caldwell he understood the rights that Caldwell recited to him, the State failed to show that Rhines understood his right to terminate questioning.

Rhines points to State v. Brings Plenty, 459 N.W.2d 390 (S.D.1990), as support for his claim that the "continuing right to remain silent" warning was insufficient. In *Brings Plenty,* the trial court ruled that statements by the defendant which were coerced and involuntary could be used to impeach the defendant, should he testify. *Id.* at

394. On appeal, we reversed and granted the defendant a new trial on the grounds that involuntary statements are inadmissible for any purpose. *Id.* at 397.

In dicta, we criticized a warning that was essentially identical to the warning given to Rhines.[2] We reasoned the advisement was deficient under *Miranda,* because it failed to inform the defendant of his right to terminate questioning at any time. *Id.* at 395-96.

Rhines' reliance on *Brings Plenty* is misplaced. First, the discussion of the warning in *Brings Plenty* is not binding precedent. Second, Detective Allender's statement that Rhines had a "continuing right to remain silent" adequately advised him of his option to terminate questioning at any time. Additional warnings given to Rhines on June 19 and 21 reinforced this advisement. When Rhines was first arrested on June 19, 1992, Officer Caldwell told him, "You have the right to remain silent. . . . [Y]ou have the right to exercise any of the above rights at any time before saying or signing anything." There was no intervening interrogation of Rhines between his arrest and questioning by Allender and Bahr that might blunt the effect of this warning.

Rhines counters that his June 19 confession must be suppressed, because there was no showing that he understood the warnings given by Caldwell and Allender concerning the right to terminate questioning. We reject

[2] According to the briefs in *Brings Plenty,* the officer advised defendant as follows: Ok, you have the continuing right to remain silent. Anything you say can be used as evidence against you. You have the right to consult with and the presence of an attorney. If you cannot afford an attorney, an attorney will be appointed to you. Do you understand these rights . . . ?

Rhines' assertion. There is ample evidence in the record indicating that Rhines had a complete understanding of his right to stop the questioning at any time. Before making any incriminating statements on June 19, Rhines specifically told Allender he would only answer the questions he liked. When the officers questioned him about a topic he did not wish to discuss, he would shut off the tape recorder or tell them to "be quiet." (For example, during the June 19, 1992 interview, Rhines turned off the recorder when the officers began to discuss whether he had been coerced into making a statement. He then explained his personal feelings toward a young man he knew and asked the officers not to dwell on the young man's involvement in the burglary of the donut shop. The officers agreed to that.)

Excerpts from the taped interview of June 19, clearly show Rhines understood his right to terminate questioning as explained by Officer Caldwell. Law enforcement adequately advised Rhines of his *Miranda* rights prior to the interview on June 19. The trial court did not abuse its discretion in admitting the statements made by Rhines on that date.

On June 21, 1992, the only advisement Rhines received was from Detective Allender. (*See* ¶ 8 supra). Allender's advisement at that time that Rhines need not answer questions he did not like and that he "can always say stop" adequately warned Rhines of his right to terminate questioning at any time. A *Miranda* warning need not be elegantly phrased or mechanically recited. *United States v. Noa,* 443 F.2d 144, 146 (9th Cir.1971) (citing *Camacho v. United States,* 407 F.2d 39, 42 n. 2 (9th Cir.1969)). The purpose of the *Miranda* warning is to explain an aspect of constitutional law to a criminal

suspect, so that he can make a voluntary, knowing and intelligent decision whether to talk to the police. Allender's straightforward statements and conversational tone are an acceptable method of advising an individual of his constitutional right to be silent in the face of police interrogation. Furthermore, Rhines' response that he "can take the 5th Amendment" demonstrates that he amply understood his privilege against self-incrimination.

2. The right to an attorney during questioning.

On June 19 and 21, 1992, Allender advised Rhines: "You have the right to consult with and have the presence of an attorney[.]" Rhines alleges this warning was deficient, because it did not explain the right to have an attorney present *during questioning* or the continuing right to request the presence of an attorney *at any point during questioning.* He contends his inculpatory statements to police should have been suppressed due to these deficiencies.

This Court has held that the statement, "You have the right to consult with and the presence of an attorney," satisfied the requirement that the suspect be advised of the right to have an attorney present *prior* to any questioning. *Brings Plenty,* 459 N.W.2d at 395. *Accord State v. Croucher,* 326 N.W.2d 98, 98-99 (S.D.1982). We must now consider whether an essentially identical warning adequately communicates the right to have an attorney present *during* questioning.

Rhines was told at the beginning of each interview that he had the right to the presence of an attorney. Because this warning was delivered at the start of each questioning session, it plainly communicated the right to

have an attorney present at that time. *Evans,* 455 F.2d at 295-96; *Sweeney v. United States,* 408 F.2d 121, 124 (9th Cir.1969); *People v. Johnson,* 90 Mich.App. 415, 282 N.W.2d 340, 342 (1979). We therefore find no *Miranda* violation.

3. The right to appointment of an attorney.

On June 19 and 21, 1992, Allender informed Rhines, "if you cannot afford an attorney an attorney can be appointed for you free of charge." According to Rhines, Detective Allender's statement that an attorney "can" be appointed is ambiguous and legally insufficient. He argues that *Miranda* requires he be advised an attorney *would* or *must* be appointed if he cannot afford to hire one.

At the heart of the *Miranda* opinion is the "concern that the indigent accused in police custody be informed that he has just as much right to representation by an attorney as a person who can afford one." *Mayfield v. State,* 293 Ark. 216, 736 S.W.2d 12, 14-15 (1987), *cert. denied,* 485 U.S. 905, 108 S.Ct. 1076, 99 L.Ed.2d 235 (1988). The *Miranda* Court wrote:

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent – the person most often subjected to

> interrogation – the knowledge that he too has a right to have counsel present.

384 U.S. at 473, 86 S.Ct. at 1627, 16 L.Ed.2d at 723. *Miranda* therefore mandated that a suspect be advised "if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." 384 U.S. at 479, 86 S.Ct. at 1630, 16 L.Ed.2d at 726.

Although the warning need not contain the exact language used in the *Miranda* opinion, it must effectively communicate the right to appointed counsel if the accused cannot afford to hire a lawyer. *Mayfield,* 736 S.W.2d at 15. In determining whether a particular warning adequately conveys this right, a reviewing court must look to the warnings as a whole rather than focusing on one sentence in isolation. *United States v. Miguel,* 952 F.2d 285, 288 (9th Cir.1991) (citing *Duckworth,* 492 U.S. at 205, 109 S.Ct. at 2881, 106 L.Ed.2d at 178).

In advancing his argument that Allender's warnings were deficient, *Rhines relies on United States v. Connell,* 869 F.2d 1349 (9th Cir.1989). In *Connell,* the Ninth Circuit Court of Appeals suppressed incriminating statements made by a defendant after he had been given a flawed advisement concerning the right to appointed counsel. *Id.* at 1353. We believe the facts in *Connell* to be clearly distinguishable.

In contrast to the defendant in *Connell,* Rhines was never told he would have to make his own arrangements for an attorney or that the government would not pay for his attorney. Nor was his right to appointed counsel contingent on a nebulous reference to the requirements of the law. Allender expressly informed Rhines of his right to remain silent, to consult with an attorney, and to have an

attorney present. In this context, Rhines was also told that an attorney "can" be appointed if Rhines could not otherwise afford one. There was no additional information to mislead him into believing that an attorney would not be appointed if he could not pay for one.

Based on the totality of the warning given to Rhines, we conclude the advisement reasonably conveyed the right to appointed counsel. *See also Duckworth,* 492 U.S. at 200-01, 109 S.Ct. at 2879, 106 L.Ed.2d at 175-76; *Miguel,* 952 F.2d at 287-88; *Tasby v. United States,* 451 F.2d 394, 398-99 (8th Cir.1971), *cert. denied,* 406 U.S. 922, 92 S.Ct. 1787, 32 L.Ed.2d 122 (1972); *State v. Blanford,* 306 N.W.2d 93, 95-96 (Iowa 1981); State v. Strain, 779 P.2d 221, 223-24 (Utah 1989).

4. Waiver of Miranda rights.

Rhines contends he was never told that, by agreeing to answer questions, he would be waiving the rights which had just been recited to him. Nor, he argues, was he specifically asked whether he was willing to waive these rights. He was simply asked, "Having these rights in mind, are you willing to answer questions?" Rhines contends this was an inadequate explanation of his option to waive *Miranda* rights and prevented him from giving a valid waiver. We disagree. An advisement need not specifically refer to a "waiver" of rights in order to be valid.

> "'*Miranda* is not a ritual of words to be recited by rote according to didactic niceties. What *Miranda* does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights.'"

Blanford, 306 N.W.2d at 96 (quoting *Coyote v. United States,* 380 F.2d 305, 308 (10th Cir.1967), *cert. denied,* 389 U.S. 992, 88 S.Ct. 489, 19 L.Ed.2d 484 (1967)).

Having determined that the warning was adequate, we must now consider whether Rhines gave a valid waiver of his rights. When the State offers an incriminating statement allegedly made by the defendant, the State has the burden of proving beyond a reasonable doubt that the statement was given knowingly, intelligently, and voluntarily. *State v. Volk,* 331 N.W.2d 67, 70 (S.D.1983). In determining whether a defendant has given a valid waiver of his *Miranda* rights, we look to the totality of the circumstances, "'including the background, experience, and conduct of the accused.'" *State v. Braddock,* 452 N.W.2d 785, 788 (S.D.1990) (quoting *State v. West,* 344 N.W.2d 502, 504 (S.D.1984)). The trial court's finding that the defendant's rights had been waived and his statements were voluntary must be upheld unless it is clearly erroneous. *Braddock,* 452 N.W.2d at 788 (citations omitted).

A waiver of *Miranda* rights need not be express, but "may be inferred from the defendant's understanding of his rights coupled with a course of conduct reflecting his desire to give up his right to remain silent and have the counsel of an attorney." *United States v. Betts,* 16 F.3d 748, 763 (7th Cir.1994) (citing *Fare v. Michael C.,* 442 U.S. 707, 724-25, 99 S.Ct. 2560, 2571-72, 61 L.Ed.2d 197, 212 (1979); *North Carolina v. Butler,* 441 U.S. 369, 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979)).

Rhines' conduct shows a valid waiver. When asked whether he understood his rights, Rhines responded that he did. He then answered affirmatively when asked if he was willing to answer questions. He was articulate and

detailed in making his statements. There is no indication that Rhines was under the influence of drugs or alcohol or that he was otherwise impaired in his functioning. Nor is there any showing that law enforcement officers unlawfully induced or coerced Rhines to make a confession. Additionally, Rhines clearly understood the consequences of relinquishing his rights, including the fact that his statements could be used against him in court. Referring to his reasons for confessing to the murder, Rhines remarked, "This will come out in court again." At another point in the questioning, Rhines told Allender and Bahr, "If you guys bring some of this stuff into court, you're gonna look really foolish[.]" When Allender reminded Rhines that "this isn't court," Rhines replied, "No. But it will be." Rhines also boldly professed to have knowledge of the statutory and case law.

Rhines' gratuitous statements reflect an individual who is aware of the potentially grave legal consequences of his confession. The trial court was not clearly erroneous in concluding that Rhines made a knowing and voluntary decision to relinquish his *Miranda* rights.

ISSUE 2.

Did the trial court err in excusing a prospective juror for cause?

As part of the jury selection process, the defense and prosecution thoroughly questioned prospective jurors. When Diane Staeffler was called for questioning, defense counsel explained the two-step process for determining guilt and setting a sentence in a capital case. After extensive questioning by the defense, the State, and the trial court regarding whether Staeffler could consider imposing

the death penalty on a defendant, the trial court denied the State's challenge for cause. The court then permitted the State to resume questioning Staeffler regarding capital punishment, followed by additional inquiries on the subject by the defense and the court. After this additional questioning, the court excused Staeffler from jury duty for cause.

Rhines challenges the trial court's ruling on two grounds. First, Rhines contends it was error for the court to permit the State to continue questioning Staeffler about her feelings on the death penalty after the trial court had already allowed such questioning and had denied the State's challenge for cause. According to Rhines, State's ensuing questions were leading and argumentative and unfairly caused Staeffler to express an unwillingness to consider the death penalty. Second, Rhines contends the trial court's subsequent decision to excuse Staeffler for cause was a violation of the rule set forth in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). He argues that *Witherspoon* requires that the trial court discharge for cause only those who make it unmistakably clear they cannot and will not follow the court's instructions with respect to the death penalty. He claims the elimination of a qualified juror from the panel in violation of *Witherspoon* invalidates the death sentence imposed on him.

Both the United States and South Dakota Constitutions guarantee trial by an impartial jury. *State v. Hansen,* 407 N.W.2d 217, 220 (S.D.1987) (citing U.S.Const.Amend. VI; S.D.Const. Art. VI, § 7; SDCL 23A-16-3); *Morgan v. Illinois,* 504 U.S. 719, 728, 112 S.Ct. 2222, 2229, 119 L.Ed.2d 492, 502 (1992) (holding the Sixth and Fourteenth Amendments to the United States Constitution require

"the impartiality of any jury that will undertake capital sentencing"). Jury selection is an important means of ensuring this right. The voir dire process is designed to eliminate persons from the venire who demonstrate they cannot be fair to either side of the case. *Morgan,* 504 U.S. at 734 n. 7, 112 S.Ct. at 2232 n. 7, 119 L.Ed.2d at 506 n. 7 (citing *Smith v. Balkcom,* 660 F.2d 573, 578 (5th Cir.1981), *modified,* 671 F.2d 858 (5th Cir.1982), *cert. denied,* 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d 148 (1982)).

In *Witherspoon,* the Court held: "[A] sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. at 1777, 20 L.Ed.2d at 784-85. The Court reasoned that executing a death sentence returned by such a jury deprives the defendant of his life without due process of law and infringes his right to trial by an impartial jury under the Sixth and Fourteenth Amendments. 391 U.S. at 518, 88 S.Ct. at 1775, 20 L.Ed.2d at 783. The Court observed:

> [T]he decision whether a man deserves to live or die must be made on scales that are not deliberately tipped toward death.

391 U.S. at 521-22 n. 20, 88 S.Ct. at 1776-77 n. 20, 20 L.Ed.2d at 784-85 n. 20.

The Court suggested that the State could legitimately exclude "those prospective jurors who stated in advance of trial that they would not even consider returning a verdict of death." 391 U.S. at 520, 88 S.Ct. at 1776, 20 L.Ed.2d at 784. However, when the State swept from the jury those who simply expressed conscientious or religious scruples

against capital punishment or who opposed it in principle, it crossed a constitutional line. 391 U.S. at 520-21, 88 S.Ct. at 1776, 20 L.Ed.2d at 784.

The United States Supreme Court has since held that the improper exclusion of even one potential juror with general objections to capital punishment requires reversal of the death penalty. *Davis v. Georgia,* 429 U.S. 122, 123, 97 S.Ct. 399, 400, 50 L.Ed.2d 339, 341 (1976); *see also Gray v. Mississippi,* 481 U.S. 648, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (plurality opinion). In determining whether a prospective juror may be excluded for cause, the Court applies the following standard: Would the individual's views "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt,* 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841, 851-52 (1985). With these principles in mind, we now consider Rhines' contentions.

1. Continued questioning of Staeffler.

Rhines contends the trial court improperly permitted the State to resume questioning Staeffler after initially denying a challenge for cause. We disagree. The "latitude allowed to counsel in voir dire of prospective jurors rests largely in the trial court's discretion." *State v. Miller,* 429 N.W.2d 26, 38 (S.D.1988) (citing *State v. Muetze,* 368 N.W.2d 575, 584 (S.D.1985)). Before the court denied the challenge for cause, the State expressly reserved the opportunity to continue questioning Staeffler "depending on the Court's ruling." The court then proceeded to question Staeffler about her ability to decide the case. First, the court asked Staeffler if she could fulfill a juror's oath

to be fair and impartial and to follow the law. Staeffler responded affirmatively. Second, the court asked if Staeffler could "consider all the law and options that the law allows." Staeffler agreed that she could. The court then denied the challenge. However, Staeffler's response to subsequent questions from the State demonstrates that she was confused by the court's questions and that additional clarification was necessary. Although Staeffler told the court she could follow its instructions, she immediately indicated to the State that she was not aware this would include consideration of the death penalty.

> State: Ma'am, the Judge just asked you whether you could consider all the options.
>
> Staeffler: Is that the death penalty?
>
> State: That includes the death penalty?
>
> Staeffler: Well – I don't know.

The defense then interjected its objection to further questioning of Staeffler about capital punishment. However, it had just become apparent that Staeffler's promises to follow the law did not take into account her reservations about the death penalty. In response to subsequent questions by the State, Staeffler's misunderstanding of the court's questions became even more apparent:

> State: What I have been asking you about is whether or not you can fairly consider it as the Judge asked you in terms of having both options, including imposing death upon this man, Mr. Rhines, and what I need to clear up is, when you answered Judge Konenkamp, did you understand what he was asking you?

Staeffler: Apparently not the first time about considering both options.

Because Staeffler had not understood the court's questions, her ability to impartially follow the court's instructions was still undetermined. We cannot fault the court for allowing additional inquiries regarding her ability to serve. As the United States Supreme Court observed:

> Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled. *Rosales-Lopez v. United States,* 451 U.S. 182, 188, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981) (White, J., plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." *Aldridge v. United States,* 283 U.S. 308, 310, 51 S.Ct. 470, 471-72, 75 L.Ed. 1054 (1931).

Morgan, 504 U.S. at 729-30, 112 S.Ct. at 2230, 119 L.Ed.2d at 503. In light of her misunderstanding of the court's inquiries, we find no abuse of discretion in giving the State the opportunity to clarify Staeffler's answers.

Nor do we agree with Rhines' claim that the State's questions were misleading or argumentative. We can detect no material difference between the questioning by the State or by defense counsel. Both the State and the defense questioned Staeffler at length about her position on the death penalty. Both used leading questions during their examination. Indeed, Staeffler's uncertainty and vacillation necessitated lengthy, detailed inquiries and the use of leading questions. Her apparent contradictions

concerning her ability to follow the court's instructions had to be explored by counsel for both sides. The defense even seemed to acknowledge the usefulness of leading questions in ascertaining Staeffler's views. At one point, defense counsel said to Staeffler, "I know I probably have been putting words in your mouth or trying to, but I don't intend to, but I'm trying to get at where you are really at on this death penalty." Later, defense counsel stated to Staeffler, "[The State's counsel is] trying to lead you down a road and I'm trying to lead you down a road, but here's what we need, we need jurors who come into this case and even though you have very strong reservations about the death penalty, we need jurors like you as well[.]" Staeffler's answers during *voir dire* appear to genuinely reflect her personal objections to capital punishment and her unwillingness to participate in the process of imposing a penalty of death. In light of similar questioning by the State and the defense, we cannot conclude that Staeffler's responses were the product of intimidation or confusion caused by the State.

2. Disqualification of Staeffler.

Rhines claims the trial court improperly excused Staeffler for cause. Rhines asserts the trial court "can only exclude those who have *unequivocally* and *without contradiction* expressed a complete inability to impose the death penalty." (Emphasis in original.) The law does not demand such precision. In *Wainwright,* the Court held that a juror's bias need not be proved with "unmistakable clarity." The Court explained:

> [D]eterminations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense

> should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law . . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Wainwright, 469 U.S. at 424-26, 105 S.Ct. at 852-53, 83 L.Ed.2d at 852-53.

In accordance with the Court's reasoning, our state law vests a trial judge with broad discretion in determining juror qualifications. *Hansen,* 407 N.W.2d at 220 (citing *State v. Flack,* 77 S.D. 176, 180, 89 N.W.2d 30, 32 (1958)). "The ruling of the trial court will not be disturbed, except in the absence of any evidence to support it[.]" *Flack,* 77 S.D. at 181, 89 N.W.2d at 32. "When the evidence of each juror is contradictory in itself, and is subject to more than one construction, a finding by the trial court either way upon the challenge is conclusive on appeal." *Id.* at 181, 89 N.W.2d at 32.

To support his claim of error, Rhines notes Staeffler responded affirmatively when the court asked if she could follow the law. However, as noted above, Staeffler misunderstood the court's query and did not realize that following the law included consideration of the death penalty. Furthermore, the impartiality of a juror "must be based upon the whole voir dire examination and single isolated responses are not determinative." *First Bank of South*

Dakota v. Voneye, 425 N.W.2d 630, 633 (S.D.1988) (citing *Hansen,* 407 N.W.2d at 220; *Flack,* 77 S.D. at 181, 89 N.W.2d at 32). Although Staeffler said at various times during voir dire that she could consider a death sentence during penalty deliberations, she also stated that she could *not* consider capital punishment under any circumstances. She made still other statements indicating that, while she might be able to consider capital punishment, she could not be fair and impartial. Staeffler said she did not like the death penalty and "would rather not" sit on a jury in a capital case. She said she did not know if she could sleep at night if she voted to impose the death penalty. When asked if she could be part of a jury that sentenced a defendant to death, Staeffler said, "Probably not" and "I don't think I could really do it." Even when defense counsel described murders that Staeffler described as "just awful," she responded, "I still don't want to make the [death penalty] decision." Upon additional questioning by the State, Staeffler said she thought capital punishment was appropriate at times but noted she was not the one making the penalty decision. Although she said that imposition of the death penalty would depend on the circumstances, she also stated that she could not imagine any circumstances where she could impose a death sentence. If selected for jury duty, she stated she would be leaning toward imposing a life sentence as opposed to the death penalty. When asked by the trial court if she would fairly consider both options, she stated, "No, I guess not." She later said, "I could consider [the death penalty], but I don't want to. I wouldn't want to make the decision for death." She then reiterated that she could not give fair consideration to both options of life imprisonment and the death penalty.

Based on a complete review of Staeffler's testimony, we conclude that her views on the death penalty would "prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions and [her] oath." *Wainwright,* 469 U.S. at 424, 105 S.Ct. at 852, 83 L.Ed.2d at 851-52. The trial court did not abuse its discretion in excusing her for cause.

ISSUE 3.

Did the State use peremptory challenges in violation of due process guarantees by excluding prospective jurors with reservations about the death penalty?

It is undisputed the State used peremptory challenges to eliminate prospective jurors who had some reservations about capital punishment. These individuals had indicated they could set aside their doubts and be fair and impartial and were therefore not excludable for cause under *Witherspoon* and its progeny. The State also waived its 19th and 20th peremptory challenges in an attempt to seat a jury before a prospective juror who had expressed equivocal sentiments about the death penalty could be called for individual questioning.

Rhines contends the State's use of peremptory challenges violated his constitutional right to a trial by a fair and impartial jury. He argues the State should not be permitted to peremptorily challenge all jurors with mere qualms about the death penalty when it is prohibited from excluding the same individuals for cause. He reasons that a jury which, because of the State's selective use of peremptory challenges, does not have any members with reservations about capital punishment is no different than

a jury from which members of that group have been excluded for cause. Rhines thus asserts his conviction and sentence must be reversed for a new trial by a jury that has not been culled of all who question the wisdom of the death penalty.

By statute, the prosecution and the defense are each given an equal number of peremptory challenges. SDCL 23A-20-20. A peremptory challenge "is an objection to a juror for which no reason need be given." SDCL 23A-20-19. It can be exercised "'without inquiry and without being subject to the court's control.'" *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, ___, 114 S.Ct. 1419, 1431, 128 L.Ed.2d 89, 108 (1994) (O'Connor, J., concurring) (quoting *Swain v. Alabama,* 380 U.S. 202, 220, 85 S.Ct. 824, 836, 13 L.Ed.2d 759, 772 (1965)). An exception is upon a prima facie showing that the prosecutor used peremptory challenges in a racially or sexually discriminatory manner. *Batson v. Kentucky,* 476 U.S. 79, 96-7, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69, 87-88 (1986); *J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1429, 128 L.Ed.2d at 106-07. The prosecutor then has the burden of establishing nondiscriminatory reasons for striking particular members of the venire. *Batson,* 476 U.S. at 97, 106 S.Ct. at 1723, 90 L.Ed.2d at 88; *J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1429, 128 L.Ed.2d at 106-07. This restriction on the State's use of peremptory challenges is based on the principle that a person's race or gender is unrelated to his fitness as a juror. *See Batson,* 476 U.S. at 87, 106 S.Ct. at 1718, 90 L.Ed.2d at 81; *J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1426-27, 128 L.Ed.2d at 102-04. However, "[t]here is no basis for declaring that a juror's attitudes towards the death penalty are similarly irrelevant to the outcome of a capital sentencing proceeding." *Brown v. North Carolina,* 479 U.S. 940, 941, 107 S.Ct. 423, 424, 93

L.Ed.2d 373, 374 (1986) (O'Connor, J., concurring). In fact, "a juror's views on capital punishment, unlike his or her race, are directly related to potential performance on a capital jury." *State v. Fullwood,* 323 N.C. 371, 373 S.E.2d 518, 525 (1988), *vacated on other grounds,* 494 U.S. 1022, 110 S.Ct. 1464, 108 L.Ed.2d 602 (1990). Ignoring these attitudes would severely inhibit the State's prosecution of capital crimes and defense counsel's zealous representation of their clients.

> There can be no dispute that a prosecutor has the right, indeed the duty, to use all legal and ethical means to obtain a conviction, including the right to remove peremptorily jurors whom he believes may not be willing to impose lawful punishment. Of course, defense counsel has the same right and duty to remove jurors he believes may be prosecution oriented. This Court's precedents do not suggest that the *Witherspoon* line of cases restricts the traditional rights of prosecutors and defense counsel to exercise their peremptory challenges in this manner.

Gray, 481 U.S. at 671-72, 107 S.Ct. at 2058, 95 L.Ed.2d at 641-42 (Powell, J., concurring).

United States Supreme Court precedent teaches that "'jury competence is an individual rather than a group or class matter.'" *J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1434, 128 L.Ed.2d at 112 (Kennedy, J., concurring) (quoting *Thiel v. Southern Pac. Co.,* 328 U.S. 217, 220, 66 S.Ct. 984, 985, 90 L.Ed. 1181, 1185 (1946)). The discriminatory use of peremptories based on race or gender gives effect to an invidious group stereotype and preempts an individualized assessment of competency. That is not the case where a juror is peremptorily challenged due to his or her own views of the death penalty. In that case, counsel has made

a particularized and fact-based appraisal of the prospective juror's ability to judge fairly and impartially. Pernicious group biases have not been given effect in that circumstance.

Rhines also ignores an important distinction between peremptory challenges and challenges for cause. Challenges for cause are unlimited, while peremptory challenges are restricted in number. In *Witherspoon,* state law permitted the prosecution to excuse for cause all jurors who expressed *any* conscientious scruples against capital punishment. 391 U.S. at 514, 88 S.Ct. at 1772-73, 20 L.Ed.2d at 780. This broad-based rule of exclusion gave the State a decided advantage in jury selection, because it was automatically guaranteed a jury free of any reservations about the death penalty.

In contrast, peremptory challenges are limited and both the State and the defendant receive the same number. SDCL 23A-20-20. Consequently, the prosecution and the defense have an equal opportunity to remove those members of the venire who, while able to follow the instructions of the court, espouse extreme views of capital punishment. *See Brown,* 479 U.S. at 941, 107 S.Ct. at 424, 93 L.Ed.2d at 374 (O'Connor, J., concurring in denial of certiorari).

> "[W]e see no . . . constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty. While a statute requiring exclusion of all jurors with any feeling against the death penalty produces a jury biased in favor of death, we have no proof that a similar bias arises, on either guilt or penalty issues, when *both parties* are allowed to exercise their equal, limited numbers of peremptory challenges . . . against jurors

> harboring specific attitudes they reasonably believe unfavorable."

People v. Gordon, 50 Cal.3d 1223, 270 Cal.Rptr. 451, 475, 792 P.2d 251, 275 (1990) (quoting *People v. Turner,* 37 Cal.3d 302, 208 Cal.Rptr. 196, 690 P.2d 669 (1984)) (emphasis in original), *cert. denied,* 499 U.S. 913, 111 S.Ct. 1123, 113 L.Ed.2d 231 (1991). *See also J.E.B.,* 511 U.S. at ___, 114 S.Ct. at 1431, 128 L.Ed.2d at 108 (O'Connor, J., concurring) ("Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of eliminat[ing] extremes of partiality on both sides, thereby assuring the selection of a qualified and unbiased jury.") (quoting *Holland v. Illinois,* 493 U.S. 474, 484, 110 S.Ct. 803, 809, 107 L.Ed.2d 905 (1990)).

Importantly, Rhines does not identify any jurors who were biased in favor of the State or otherwise incapable of fairly weighing the facts and applying the law. He simply objects to the elimination of jurors who may have been less inclined to impose a death sentence. "[A]n impartial jury consists of nothing more than 'jurors who will conscientiously apply the law and find the facts.'" *Lockhart v. McCree,* 476 U.S. 162, 178, 106 S.Ct. 1758, 1767, 90 L.Ed.2d 137, 151 (1986) (quoting *Wainwright,* 469 U.S. at 423, 105 S.Ct. at 852, 83 L.Ed.2d at 841) (emphasis deleted). "[W]e do not think, simply because a defendant is being tried for a capital crime, that he is entitled to a legal presumption or standard that allows jurors to be seated who quite likely will be biased in his favor." *Wainwright,* 469 U.S. at 423, 105 S.Ct. at 852, 83 L.Ed.2d at 851. Furthermore, the law does not demand a balanced sampling of opinions in the jury box.

> [I]f it were true that the Constitution required a certain mix of individual viewpoints on the jury, then trial judges would be required to undertake the Sisyphean task of "balancing" juries, making sure that each contains the proper number of Democrats and Republicans, young persons and old persons, white-collar executives and blue-collar laborers, and so on.
>
> * * *
>
> . . . [I]t is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints. Prospective jurors come from many different backgrounds, and have many different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

Lockhart, 476 U.S. at 183-84, 106 S.Ct. at 1770, 90 L.Ed.2d at 154-55.

We therefore hold there is no state or federal constitutional prohibition against the State's use of peremptory challenges to exclude all prospective jurors who expressed reservations about the death penalty but were not excludable for cause on that basis.

ISSUE 4.

Do South Dakota's capital punishment statutes violate the state or federal constitution?

Rhines contends that South Dakota's capital punishment statutes violate the state and federal constitutions

on a number of grounds. In considering his claims, we reiterate that there is a strong presumption in favor of the constitutionality of a statute. *State v. Floody,* 481 N.W.2d 242, 255 (S.D.1992) (citing *Simpson v. Tobin,* 367 N.W.2d 757, 765 (S.D.1985)). This presumption is rebutted only when it appears clearly, palpably, and plainly that the statute violates a constitutional provision. *Id.*

1. Distinctions between felony murder and premeditated murder.

To satisfy constitutional requirements, a capital sentencing scheme "must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235, 249-50 (1983). Under South Dakota law, both felony murder and premeditated murder are punishable by death or by life imprisonment. SDCL 22-16-4; 22-16-12; 22-6-1.

At the time of the killing of Schaeffer, South Dakota law defined felony murder as a homicide "committed by a person engaged in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, or unlawful throwing, placing or discharging of a destructive device or explosive." SDCL 22-16-4. Premeditated murder is defined as a homicide "perpetrated without authority of law and with a premeditated design to effect the death of the person killed or of any other human being." *Id.*

In order to impose a death sentence on an individual convicted of either felony murder or premeditated murder, the jury must find the existence of at least one statutory aggravating circumstance beyond a reasonable doubt.

SDCL 23A-27A-4, -5. At the time of Rhines' crime, SDCL 23A-27A-1 listed the following aggravating circumstances:

> (1) The offense was committed by a person with a prior record of conviction for a Class A or Class B felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions;
>
> (2) The defendant by his act knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
>
> (3) The defendant committed the offense for himself or another, for the purpose of receiving money or any other thing of monetary value;
>
> (4) The defendant committed the offense on a judicial officer, former judicial officer, prosecutor, or former prosecutor while such prosecutor, former prosecutor, judicial officer, or former judicial officer was engaged in the performance of his official duties or where a major part of the motivation for the offense came from the official actions of such judicial officer, former judicial officer, prosecutor, or former prosecutor;
>
> (5) The defendant caused or directed another to commit murder or committed murder as an agent or employee of another person;
>
> (6) The offense was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
>
> (7) The offense was committed against a law enforcement officer, employee of a corrections institution,

or fireman while engaged in the performance of his official duties;

(8) The offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement;

(9) The offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another; or

(10) The offense was committed in the course of manufacturing, distributing, or dispensing substances listed in Schedules I and II in violation of § 22-42-2.

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Rhines argues that individuals who commit felony murder are less culpable than those who are guilty of premeditated murder, presumably because they lack the specific intent to kill another human being. He claims the law therefore fails to distinguish between those individuals who deserve the death penalty and those who do not.

We reject Rhines' claim for three reasons. First, we note Rhines was convicted of premeditated murder, not felony murder. Therefore, any constitutional inequities in the punishment of felony murderers are inapplicable to his case. Second, we cannot agree that individuals who commit murder while engaged in other serious crimes are less deserving of the death penalty than those who commit premeditated murder. Rhines implies that only those who intend to kill should qualify for the death penalty. While we agree that intent is a relevant consideration, we do not agree that only those who intend to kill should receive the ultimate punishment. The malicious motives elemental to felony murder can also justify a sentence of death. The law

is free to equally condemn those who murder with the intent to kill and those who also murder, but do so with the intent to rape, steal, or burn.

Third, in claiming that felony murder is less deserving of capital punishment, Rhines ignores the long list of statutory aggravating circumstances that further limit the imposition of the death sentence. Unless the jury finds at least one of these aggravating circumstances, indicating more extreme criminal culpability, an individual guilty of felony murder cannot receive the death sentence. We therefore conclude the State's capital sentencing scheme "reasonably justif[ies] the imposition of a more severe sentence on [certain] defendant[s] compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742, 77 L.Ed.2d at 249-50. Rhines' constitutional challenge is rejected.

2. Defining and narrowing "death eligible" offenses.

Without identifying any other specific infirmities, Rhines separately alleges that the legislature's broad delineation of Class A felonies, combined with the statutory aggravating circumstances in SDCL 23A-27A-1, does not sufficiently narrow and define the pool of "death eligible" offenses. He further argues that the trial court may not cure these constitutional defects by fashioning jury instructions to define and limit capital crimes. He asserts that to do so would violate the separation of powers between the legislative and judicial branches and represent an unconstitutional delegation of legislative authority.

Rhines makes the generalized complaint that the pool of death eligible offenses is too broad. He does not articulate any specific reasons why these classifications are inadequate. We note the United States Supreme Court has approved a state capital punishment scheme that is nearly identical to South Dakota's death penalty laws. *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Rhines' general allegations defy more meaningful review and therefore fail.

As to Rhines' claim that state courts are prohibited from fashioning limiting instructions, we must disagree. The United States Supreme Court has held that the existence of vague and overbroad definitions of capital crimes does not necessarily establish a constitutional violation. *Walton v. Arizona,* 497 U.S. 639, 653-54, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511, 528-29 (1990). The Court expressly acknowledged that a state court may further define and limit otherwise vague and overbroad aggravating factors so as to provide guidance to the sentencer and satisfy constitutional requirements. 497 U.S. at 654, 110 S.Ct. at 3057, 111 L.Ed.2d at 529.

3. Guidance concerning mitigating evidence.

When the jury returns a guilty verdict in a capital case, the trial court must conduct a presentence hearing before the jury. SDCL 23A-27A-2. At that time, the jury may hear additional evidence in mitigation and aggravation of punishment. *Id.* Under South Dakota's capital sentencing statutes, the jury must find the existence of an aggravating circumstance beyond a reasonable doubt before it may impose the death penalty. SDCL 23A-27A-4 and -5. The law permits the jury to consider any

mitigating circumstances, but does not impose any standard of proof regarding mitigation. SDCL 23A-27A-1 and -2.

Rhines asserts that death sentences will be arbitrarily imposed in violation of the state and federal constitutions, because the South Dakota capital sentencing statutes do not include a standard of proof for mitigating circumstances or otherwise explain how the jury should weigh evidence of mitigation.

In determining whether an individual eligible for the death penalty should in fact receive that sentence, the law demands that the jury make "an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Tuilaepa v. California,* 512 U.S. 967, ___, 114 S.Ct. 2630, 2635, 129 L.Ed.2d 750, 760 (1994) (citations omitted) (emphasis in original). "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Blystone v. Pennsylvania,* 494 U.S. 299, 307, 110 S.Ct. 1078, 1083, 108 L.Ed.2d 255, 264 (1990). Capital sentencing procedures that permit the jury to exercise wide discretion in evaluating mitigating and aggravating facts are consistent with an individualized sentencing determination. *Tuilaepa,* 512 U.S. at ___, 114 S.Ct. at 2636, 129 L.Ed.2d at 761. South Dakota's open-ended treatment of mitigating evidence coincides with the mandate of individualized sentencing.

Our state's capital sentencing scheme is modeled after Georgia's sentencing procedures. In *Gregg,* a plurality of the United States Supreme Court gave tacit approval to the Georgia scheme:

> While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence[.]

Gregg, 428 U.S. at 206-07, 96 S.Ct. at 2941, 49 L.Ed.2d at 893 (plurality opinion of Stewart, Powell, and Stevens, J.J.). *See also Zant*, 462 U.S. at 875, 103 S.Ct. at 2741-42, 77 L.Ed.2d at 248-49 (noting the *Gregg* Court approved Georgia's capital sentencing statute even though it did not enunciate specific standards to guide the jury's consideration of aggravating and mitigating circumstances).

Similarly, the Court has opined: "A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision . . . . '[D]iscretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed' is not impermissible in the capital sentencing process." *Tuilaepa*, 512 U.S. at ___, 114 S.Ct. at 2638-39, 129 L.Ed.2d at 764 (quoting *McCleskey v. Kemp*, 481 U.S. 279, 315 n. 37, 107 S.Ct. 1756, 1779 n. 37, 95 L.Ed.2d 262, 293 n. 37 (1987)). The Court has stated its position in even more emphatic terms:

> We have rejected the notion that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155, 169 (1988). Equally settled is the corollary that the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer.

Harris v. Alabama, 513 U.S. 504, ___, 115 S.Ct. 1031, 1035, 130 L.Ed.2d 1004, 1014 (1995). Based on this authority, we conclude that South Dakota's statutes adequately direct the jury's evaluation of aggravating and mitigating evidence during the capital sentencing phase.

4. The jury as sentencer.

SDCL 23A-27A-4 states that upon receipt of a jury recommendation of death, the trial judge "*shall* sentence the defendant to death." (Emphasis supplied.) Rhines contends this mandatory provision prevents the trial judge from ruling on the appropriateness of the jury's verdict, as he may in other cases, and therefore violates equal protection guarantees. He asserts the trial court cannot consider whether the sentence was imposed arbitrarily, whether the evidence supported the jury's finding of an aggravating circumstance, and whether the sentence was excessive or disproportionate to the penalty imposed in similar cases. He further argues the mandatory nature of the jury's verdict denies the capital defendant the opportunity to request a judgment of acquittal or file a motion for a new trial.

Neither the state nor federal constitution require the trial court to review the propriety of the jury's sentencing decision in a capital case. The United States Supreme Court has approved a capital sentencing scheme that permits the jury, rather than the trial court, to make the sentencing decision. *Gregg*, 428 U.S. at 206-07, 96 S.Ct. at 2940-41, 49 L.Ed.2d at 893 (plurality opinion of Stewart, Powell, and Stevens, J.J.); *Gregg*, 428 U.S. at 221-24, 96 S.Ct. at 2947-49, 49 L.Ed.2d at 901-04 (concurring opinion of White, Rehnquist, J.J., and Burger, C.J.). In approving

this scheme, the Court did not mandate that the trial judge independently review the jury's sentencing decision. Additionally, in *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Court seemed to acknowledge the jury's legitimate role as sentencer in a capital case: "This Court's decisions indicate that the discretion of the sentencing authority, *whether judge or jury,* must be limited and reviewable." 468 U.S. at 462, 104 S.Ct. at 3163, 82 L.Ed.2d at 354 (emphasis added). The Court further wrote:

> We have no particular quarrel with the proposition that juries, perhaps, are more capable of making the life-or-death decision in a capital case than of choosing among the various sentencing options available in a noncapital case. Sentencing by the trial judge certainly is not required by *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). What we do not accept is that, *because juries may sentence,* they constitutionally must do so. (Emphasis supplied.)

468 U.S. at 463 n. 8, 104 S.Ct. at 3163-64 n. 8, 82 L.Ed.2d at 354 n. 8.

In addition, unlike any other criminal defendants, individuals who are sentenced to death by a jury or a trial judge receive automatic appellate review of their sentence. SDCL 23A-27A-9 ("If the death penalty is imposed, and if the judgment becomes final in the trial court, the sentence *shall* be reviewed on the record by the South Dakota Supreme Court.") (Emphasis supplied.) In evaluating the sentence, this Court must determine:

> (1) Whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

SDCL 23A-27A-12.

In light of this Court's sweeping, mandatory review of a capital defendant's sentence, we find no constitutional error in vesting the sentencing decision solely in the jury rather than the trial court.

ISSUE 5.

Did the trial court abuse its discretion in admitting statements by Rhines concerning inequities in the justice system?

Over Rhines' objection, the trial court admitted the following portion of his June 19, 1992, taped confession for the jury's consideration during the guilt phase of the trial:

> Allender: You don't really buy into our justice system do you? I mean you don't really believe in it?
>
> Rhines: Justice?
>
> Allender: Yeah.
>
> Rhines: For who? If I had $100,000 for a fancy attorney I'd walk. Free, on an acquittal.
>
> Bahr: Do you think that's right, that, that?
>
> Rhines: Do you?
>
> Bahr: No, not if you took a life.

Rhines: You know it's true.

Bahr: Do you . . .

Rhines: If I had $100,000 to drop into the best attorney in the country or in the midwest region.

Bahr: But see anything's possible, Charles. But if somebody takes a life.

Rhines: I've seen guilty and then walk. Knowing they were guilty.

Bahr: Would you want to get off?

Rhines: Would you?

Bahr: I'm not in that predicament.

Rhines: Me neither.

Bahr: You've been completely honest with us, Charles?

Rhines: I'm not, I'm not in a predicament of wanting to get off and having the wherewithal to do so. I'm in the predicament of wanting to get off and not having the wherewithal to do so.

Bahr: Have you been truthful with us?

Rhines: As much as I can emotionally.

Bahr: These sequences as best your, that you can remember? I don't have anything further.

Allender: Either do I.

Rhines: Do you suppose uh try for a last Camel before the night?

Allender: Yeah.

Rhines: It's gonna be kind of rough (inaudible -- talking over)

Allender: Um, just a second. This will be the end of this tape is 2232.

The trial court found the discussion gave insight into the nature of Rhines' statements to law enforcement officers, showed his state of mind at the time of his confession, and allowed the jury to weigh Rhines' attitude about his confession and his crime. The court further found the probative value of this evidence outweighed any prejudicial effect.

During the penalty phase of the trial, the State asked the court to instruct the jury to reconsider the evidence previously entered during the guilt proceedings. This would necessarily include Rhines' statements regarding the justice system. The defense did not raise any objections and the jury was instructed to reconsider all evidence previously admitted during the guilt phase.[3]

Rhines argues his statements concerning the justice system were not relevant to either the guilt or sentencing proceedings. He disputes the trial court's finding that his remarks were relevant to his state of mind or the reliability of his confession. He asserts the statements were inadmissible character evidence, that portrayed him as a bad person who distrusted and scorned the criminal

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[3] Under SDCL 23A-27A-12, this Court must determine "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." Because of this independent basis for reviewing the proceedings in a capital sentencing hearing, we need not decide whether the failure to renew evidentiary objections during the penalty phase constitutes a waiver or triggers plain error analysis. *See State v. Sonnier*, 379 So.2d 1336, 1370 (La.1980).

justice system. Rhines acknowledges that the effect of these statements on the jury's guilty verdict "may well have been minor or slight." However, he asserts the admission of his statements unfairly prejudiced him during the sentencing phase of the trial and warrant reversal of the jury's death sentence.

According to the State, Rhines' remarks reflect on the reliability and voluntariness of his statements, a relevant inquiry during the guilt phase of the trial. The State also asserts the sentencer must have a broad range of information so that it may appropriately determine the sentence, and evidence of Rhines' background and character, particularly his lack of remorse, was highly relevant to this determination. Even if the evidence was not admissible, the State argues any error was harmless.

"Evidence which is not relevant is not admissible." SDCL 19-12-2. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." SDCL 19-12-1. However, the trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice [.]" SDCL 19-12-3. This delicate balancing process is within the trial court's sound discretion and the court's ruling will not be disturbed absent abuse. *State v. Cross,* 390 N.W.2d 564, 566 (S.D.1986); *State v. Thomas,* 381 N.W.2d 232, 235 (S.D.1986).

1. Admissibility at guilt phase.

Contrary to Rhines' contention, the trial court properly determined his statements were relevant to the

determination of guilt. The remarks in question tend to show the truthfulness of Rhines' confession. Rhines compared himself to other individuals who are guilty of murder. He referred to "wanting to get off." He also stated that he was as truthful as he could be with the officers. All of these statements reinforce State's assertion that Rhines killed Schaeffer and that his confession to the crime was freely and knowingly given.

Nor can we conclude that admission of the remarks unduly prejudiced Rhines during the guilt phase. Prejudice "refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *State v. Holland,* 346 N.W.2d 302, 309 (S.D.1984). The statements in question were brief and occurred at the end of Rhines' lengthy and detailed confession. In this context, the jury was more likely to rely on the statements for their legitimate purpose – as proof of the reliability of Rhines' confession, rather than as evidence of bad character.

Even if the statements were improperly admitted, it would constitute harmless error. Evidence of Rhines' guilt was overwhelming. Rhines confessed to the burglary and murder four times, once to a young woman and three times to law enforcement officers. The jury even listened to tape recordings of Rhines confessing to the burglary and the murder. His statements about the location of clothing and other items that he discarded after the crime were substantiated by witnesses who discovered the items. The defense did not refute any of the State's evidence, having rested immediately after the conclusion of the State's case. In light of the strong evidence of Rhines' guilt, it is unlikely the jury would unfairly rely on Rhines' disputed statements in rendering a guilty verdict.

2. Admissibility at penalty phase.

In all capital cases where the jury has rendered a guilty verdict, state law requires a hearing prior to sentencing. SDCL 23A-27A-2. "Such hearing shall be conducted to hear additional evidence in mitigation and aggravation of punishment." *Id.* In this case, the trial court granted a defense motion prohibiting the State from offering any evidence on non-statutory aggravating factors. The State was therefore restricted to offering evidence that related to the aggravating circumstances set forth in SDCL 23A-27A-1.

Rhines contends the disputed statements were irrelevant to any of the aggravating circumstances urged by the State. We disagree. One aggravating factor alleged by the State was that Rhines committed the murder to avoid being arrested for burglary. SDCL 23A-27A-1(9). In the disputed discussion, Rhines indicated he wanted "to get off" and that only his lack of money prevented him from doing so. His desire to avoid punishment in spite of his admitted wrongdoing directly relates to his alleged motive for killing Schaeffer – to avoid lawful arrest and confinement. The possibility that the jury might disapprove of Rhines' cynical attitude is not enough to defeat the probative value of this evidence. Furthermore, even if the evidence was irrelevant or unfairly prejudicial, any error was harmless. There was ample evidence relating to the circumstances of the murder. As noted above, Rhines confessed four times, once to a young woman and three times to law enforcement officers, and the jury listened to recordings of two of Rhines' confessions. Armed with Rhines' own account of his crime, it is unlikely the jury relied on the disputed remarks in ascertaining the circumstances of Schaeffer's death and rendering its sentence.

ISSUE 6.

Did the trial court abuse its discretion in refusing to appoint a forensic communication expert to assist Rhines in preparing his case?

Rhines submitted a pretrial motion for appointment of a forensic communication expert to conduct and analyze a community attitude study and design a supplemental juror questionnaire at the county's expense. Rhines was concerned that his homosexuality would unfairly influence the jury, and he anticipated using the community attitude survey and juror questionnaire to address this issue. The trial court denied Rhines' motion.

Rhines claims the denial of the motion was an abuse of the trial court's discretion. He contends voir dire alone was an inadequate method for detecting and eliminating jurors with biases against homosexuality. To support his claim, he points to portions of a three-page note composed by the jury and delivered to the court during penalty deliberations. The note included the following questions:

> Will Mr. Rhines be allowed to mix with the general inmate population?
>
> Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and or young men jailed for lesser crimes (Ex: drugs, DWI, assault, etc.)?
>
> Will Mr. Rhines be allowed to marry or have conjugal visits?
>
> Will Mr. Rhines be jailed alone or will he have a cell mate?

The trial court responded to the jury's questions with the following written statement: "I acknowledge your note

asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions."

Rhines contends the jury's note reflected homophobic sentiments that improperly affected jury deliberations. He asks this Court to reverse his conviction and sentence and order that he receive the requested expert assistance on retrial.

The appointment of an expert is within the trial court's discretion. *State v. Stuck,* 434 N.W.2d 43, 50 (S.D.1988) (citing *State v. Archambeau,* 333 N.W.2d 807, 811 (S.D.1983)). "Trial courts should scrutinize a defense request for an expert to insure that an indigent defendant may procure any reasonable defense, and, when in doubt, lean toward the appointment of such an expert." *Id.* at 51 (citing *State v. Hallman,* 391 N.W.2d 191, 195 (S.D.1986)). Where an indigent defendant such as Rhines requests appointment of an expert at county expense, four requirements must be satisfied: (1) the request must be in good faith; (2) it must be reasonable in all respects; (3) it must be timely and specifically set forth the necessity of the expert; and (4) it must specify that the defendant is financially unable to obtain the required service himself and that such services would otherwise be justifiably obtained were defendant financially able. *Id.* (Citations omitted.)

In this case, there was no necessity for a public opinion survey and supplemental questionnaire to ascertain juror bias. "[V]oir dire examination is the better forum for ascertaining the existence of hostility towards the accused." *State v. Smith,* 477 N.W.2d 27, 33 (S.D.1991) (citing *State v. Reutter,* 374 N.W.2d 617, 629 (S.D.1985)). Our review of voir dire shows an impartial jury was

impaneled. Defense counsel questioned eleven of the twelve jurors regarding their feelings about homosexuality. Ten of the jurors expressed neutral feelings about homosexuality, indicating it would have no impact on their decision making. The eleventh juror stated that she regards homosexuality as sinful. However, she also stated Rhines' sexual orientation would not affect how she decided the case. Rhines' counsel did not seek to remove this juror from the panel.

Although Rhines contends the jury's note to the judge shows a bias against homosexuality, we do not agree. The jury's questions during the penalty phase relate to prison conditions rather than Rhines' sexual orientation. The jurors began the note with the following statement:

> Judge Konnekamp [sic],
>
> In order to award the proper punishment we need a clear prospective [sic] of what "Life In Prison Without Parole" really means. We know what the Death Penalty Means, but we have no clue as to the reality of Life Without Parole.

Other questions posed by the jury involved whether Rhines would be given work release, placed in a minimum security prison, allowed to create a group of followers or admirers, permitted to attend college, or allowed to "have or attain any of the common joys of life (ex TV, Radio, Music, Telephone or hobbies and other activities allowing him distraction from his punishment)." The jury also asked what the daily routine would be in prison. The jury closed with these remarks:

> We are sorry, Your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternatives. On one hand there is

> Death and on the other hand what is Life in prison w/out parole.

In this context, the jury's questions about Rhines marrying, having a cell mate or conjugal visits, and having contact or discussions with other inmates do not reflect a bias against Rhines' sexual preference. Instead, they reflect the jury's legitimate efforts to weigh the appropriateness of life imprisonment versus the death penalty. We find no abuse of discretion by the trial court.

ISSUE 7.

Did the trial court abuse its discretion by refusing three of Rhines' proposed jury instructions?

The trial court refused Rhines' proposed jury instructions Nos. 8, 9 and 11. Rhines claims the trial court's failure to give these instructions violated the due process and cruel punishment clauses of the United States and South Dakota Constitutions.

The trial court has broad discretion in instructing the jury. *State v. Bartlett,* 411 N.W.2d 411, 415 (S.D.1987). "[J]ury instructions are adequate when, considered as a whole, they give the full and correct statement of the law applicable to the case." *State v. Fast Horse,* 490 N.W.2d 496, 499 (S.D.1992) (citing *State v. Grey Owl,* 295 N.W.2d 748, 751 (S.D.1980)) (emphasis omitted). To warrant reversal, the trial court's refusal to give an appropriate instruction must unfairly prejudice the defendant. The defendant must show that "'the jury might and probably would have returned a different verdict if [the] instruction had been given.'" *Bartlett,* 411 N.W.2d at 415 (quoting *Grey Owl,* 295 N.W.2d at 751, *appeal after remand,* 316 N.W.2d 801 (S.D.1982)).

We will consider each of Rhines' proposed jury instructions separately.

1. Proposed jury instruction No. 8: sufficiently substantial aggravating circumstances.

Rhines' proposed jury instruction No. 8 stated in relevant part:

> South Dakota law allows the imposition of the death penalty only if the prosecution, in addition to proving that the defendant is guilty of murder in the first degree, also proves each of the following beyond a reasonable doubt:
>
> (1) That one or more of the alleged aggravating circumstances exist; and
>
> (2) That the aggravating circumstance or circumstances, considered in connection with any mitigating circumstances, are sufficiently substantial to require the death penalty in this case, and that death is the only appropriate punishment for the crime committed, and for the defendant.

Rhines contends the proposed instruction was necessary to suitably limit and guide the jury's sentencing discretion. We disagree. Rhines' proposed instruction would require that aggravating circumstances be "sufficiently substantial." Neither the state nor federal constitutions impose this requirement. Once the sentencer finds the existence of a statutory aggravating circumstance, it has broad discretion to decide whether to impose the sentence of death. Further, the "sufficiently substantial" standard does little to aid the jury in its difficult sentencing decision. The trial court instructed the jury that the death penalty could not be imposed unless at least one

aggravating circumstance was present beyond a reasonable doubt. The trial court further instructed that the jury could impose a penalty of life imprisonment even if it found the existence of one or more statutory aggravating circumstances, explaining that a life sentence could be imposed for any or no reason. These instructions were sufficient to guide the jury's discretion.

2. Rhines' proposed jury instruction No. 9: presumption of life imprisonment.

Rhines' proposed instruction No. 9 stated in pertinent part:

> The law also presumes that the appropriate sentence for murder in the first degree is life in prison without parole. This presumption is sufficient to justify your recommendation that the appropriate sentence in this case is life in prison without parole. Only if the jury is unanimously convinced beyond a reasonable doubt both that one or more aggravating circumstances exist, and that the death penalty is the only appropriate sentence in this case, may the jury return a verdict recommending a sentence of death.

According to Rhines, his death sentence violates the due process and cruel punishment clauses of the state and federal constitutions, because the jury was not instructed regarding the presumption in favor of life imprisonment over the death penalty.

The trial court's instructions adequately advised the jury of the State's burden of proof and the presumption of innocence in favor of the defendant. The court instructed the jury:

> In this case the law raises no presumption against the Defendant, but every presumption of the law is in favor of his innocence as to the alleged aggravating circumstances. He is not required to prove himself innocent of the aggravating circumstances, or put in any evidence at all upon that subject. The fact that the Defendant has not testified in this case raises no presumption against him, and you must give no thought to the fact that the Defendant did not testify in his own behalf in this case in arriving at your sentencing decision.

Furthermore, the law gives the jury broad discretion to impose life imprisonment rather than a sentence of death, and the trial court properly instructed the jury in this regard. As noted above, the trial court informed the jury they could impose a life sentence regardless of whether they found any aggravating circumstances that might otherwise authorize the imposition of the death penalty. The trial court further advised the jury that they need not find the existence of any mitigating facts or circumstances in order to fix the penalty at life imprisonment. Finally, the court charged the jury that they may fix the penalty at life imprisonment for any reason or without any reason. These instructions, taken together, amply informed the jury of their authority to set the penalty at life imprisonment. There was no abuse of discretion in refusing Rhines' proposed instruction.

3. Rhines' proposed jury instruction No. 11: effect of life or death sentences.

Rhines' proposed jury instruction No. 11 stated:

> The two specified sentences that you are to consider in this case are death, and life in prison without parole.

> In your deliberations, you are to presume that if you sentence Charles Russell Rhines to death, he will in fact be executed by lethal injection. You must not assume or speculate that the courts, or any other agency of government, will stop the defendant's execution from taking place.
>
> Similarly, you are to presume that if you sentence Charles Russell Rhines to life in prison without parole, he will in fact spend the rest of his natural life in prison. You must not assume or speculate that the courts, or any other agency of government, will release the defendant from prison at any time during his life.

The note sent by the jury to the trial judge asked whether Rhines could ever be placed in a minimum security prison or given work release. According to Rhines, this demonstrates that the trial court's instructions were inadequate, and that the jury was unduly concerned that Rhines would be released if he received a life sentence. He claims he was unfairly prejudiced by the trial court's refusal to read the instruction.

We believe the trial court's instruction adequately advised the jury regarding the effect of either a life or death sentence. The trial court informed the jury:

> The decision you make will determine the sentence which will be imposed by the court. If you decide on a sentence of death, the court will impose a sentence of death. If you decide on a sentence of life imprisonment without parole, the court will impose a sentence of life imprisonment without parole.

The trial court's instruction gave a "full and correct statement of the law." There was no error in refusing Rhines' proposed instruction.

ISSUE 8.

Did the trial court err in allowing victim impact testimony during the penalty phase of the trial?

SDCL 23A-27A-1 sets forth the aggravating circumstances which may be considered by a judge or jury when determining whether to impose the sentence of death. Effective July 1, 1992, nearly four months after the murder of Donnivan Schaeffer, the legislature amended SDCL 23A-27A-1 to permit "testimony regarding the impact of the crime on the victim's family."[4] 1992 S.D.Sess.L. ch. 173, § 2.

During a pretrial motion hearing, the State gave oral notice of intent to offer victim impact testimony at the penalty phase of the proceedings. Rhines filed a motion to exclude any such testimony. Following a hearing, the trial court ruled that victim impact testimony would be allowed during the penalty proceedings based on the case of *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The Court indicated that such evidence could be offered "in response to Defendant's mitigating evidence."

Peggy Schaeffer, Donnivan Schaeffer's mother, read the following statement during State's rebuttal at the penalty hearing:

> Donnivan was our youngest son. He was a happy, considerate and helpful young man. His dreams were to finish school, live on his own, and get married. He attended Vo-Tech and had a job waiting for him when he graduated. His plan was to marry Sheila Pond in May, 1993. Our dreams were becoming his dreams

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[4] This provision has since been deleted from SDCL 23A-27A-1 and inserted in SDCL 23A-27A-2.

and those dreams are never to be a reality. Not having Donnivan with us has left us with heartache and sadness that at times seem unbearable. Now, at the end of the hall in our home is a bedroom filled with memories and we can only dream of the future Donnivan may have had.

Rhines contends the trial court committed reversible error by allowing the introduction of Peggy Schaeffer's victim impact testimony. He makes numerous arguments in support of his position. First, Rhines asserts the *Payne* decision simply authorizes states to pass laws that allow the sentencer to consider some types of victim impact evidence. He argues that at the time of Rhines' alleged offense, South Dakota statutes and case law did not authorize admission of victim impact testimony, so the evidence was inadmissible. Second, Rhines notes the South Dakota Legislature did amend SDCL 23A-27A-1 to explicitly allow victim impact testimony, but only did so after Schaeffer's murder and the Court's decision in *Payne*. Rhines contends the amendment is a substantive rather than a procedural law. Because this statutory provision was not in effect at the time of Rhines' alleged offense, he argues the admission of victim impact testimony violated the constitutional prohibition against *ex post facto* laws. *See* U.S.Const. Art. I, § 10; S.D.Const. Art. VI, § 12. Third, Rhines objects to the characterization of the victim impact statement as a rebuttal to evidence offered by Rhines during the penalty phase. During the sentencing proceedings, Rhines offered the testimony of his two sisters. He claims their testimony was limited to his upbringing and their relationship with him; they did not testify to Donnivan Schaeffer's character or the impact of his death on his family. Fourth, even if otherwise admissible, Rhines claims Peggy Schaeffer's testimony went beyond the

bounds of victim impact testimony, because at least half of the statement described Schaeffer's personal characteristics rather than the impact of his death. Finally, Rhines asserts the improper admission of Peggy Schaeffer's testimony was not harmless error, because the jury likely would have imposed a less severe sentence without this evidence.

We hold that the trial court did not abuse its discretion in admitting the victim impact testimony. In *Payne*, 501 U.S. at 817, 111 S.Ct. at 2604, 115 L.Ed.2d at 730, the Court reconsidered whether "the Eighth Amendment prohibits a capital sentencing jury from considering 'victim impact' evidence relating to the personal characteristics of the victim and the emotional impact of the crimes on the victim's family." The Court had previously held that such evidence was *per se* inadmissible in the penalty phase of a capital trial. *Payne*, 501 U.S. at 811, 111 S.Ct. at 2601, 115 L.Ed.2d at 726 (citing *South Carolina v. Gathers*, 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989); *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)).

The Court began by noting that the impact of a defendant's crime is a relevant sentencing consideration:

> [T]he assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of the offense and in determining the appropriate punishment.

Payne, 501 U.S. at 819, 111 S.Ct. at 2605, 115 L.Ed.2d at 731. The Court further observed that "the sentencing authority has always been free to consider a wide range of relevant material." 501 U.S. at 820-21, 111 S.Ct. at 2606,

115 L.Ed.2d at 732. As to the propriety of admitting victim impact testimony in a capital sentencing proceeding, the Court reasoned:

> Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities . . . . We are now of the view that a State may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. The State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family. By turning the victim into a faceless stranger at the penalty phase of a capital trial, *Booth* deprives the State of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first-degree murder.

501 U.S. at 825, 111 S.Ct. at 2608, 115 L.Ed.2d at 735 (citations and quotations omitted). The Court therefore concluded "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

Payne was decided in June, 1991, months before Rhines' murder of Schaeffer in March, 1992. Therefore, the rule in *Payne* does not implicate *ex post facto* analysis. However, Rhines contends that *Payne* requires a specific

state statute authorizing the admission of victim impact evidence. We can discern no such requirement in the Court's opinion. In fact, the Court seems to regard victim impact testimony as no different than other evidence for purposes of determining admissibility. The *Payne* Court wrote: "There is no reason to treat such evidence differently than other relevant evidence is treated." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

Under South Dakota law, evidence is generally admissible so long as it is relevant and is not unfairly prejudicial. SDCL 19-12-2, -3. We review the trial court's ruling on the admissibility of evidence under the abuse of discretion standard. *Thomas,* 381 N.W.2d at 235.

The victim impact statement read by Schaeffer's mother related to her son's personal characteristics and the emotional impact of the crimes on the family. This is precisely the type of evidence permitted by the Court's decision in *Payne,* 501 U.S. at 817, 111 S.Ct. at 2604, 115 L.Ed.2d at 730. Rhines is therefore incorrect when he asserts that victim impact evidence may not include testimony about the victim's personal characteristics.

Additionally, the information contained in the statement was relevant to the jury's sentencing decision. As noted by the *Payne* court, assessment of the harm caused by a criminal act is an important factor in determining the appropriate punishment. 501 U.S. at 819, 111 S.Ct. at 2605, 115 L.Ed.2d at 731. "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." 501 U.S. at 827, 111 S.Ct. at 2609, 115 L.Ed.2d at 736.

Furthermore, the probative value of the victim impact statement was not substantially outweighed by the danger of unfair prejudice. *See* SDCL 19-12-3. The brief testimony by Schaeffer's mother came after Rhines' sisters testified about his upbringing and good qualities, their love for him, and the negative effect his death would have on their family. To paraphrase *Payne,* the victim impact statement "illustrated quite poignantly some of the harm that [Rhines'] killing had caused; there is nothing unfair about allowing the jury to bear in mind that harm at the same time as it considers the mitigating evidence introduced by the defendant." 501 U.S. at 826, 111 S.Ct. at 2609, 115 L.Ed.2d at 736. We therefore hold that the trial court did not abuse its discretion in admitting the statement read by Schaeffer's mother.

ISSUE 9.

Did the trial court err in its instructions to the jury regarding the definition of "depravity of mind" for purposes of imposing the penalty of death?

The Eighth and Fourteenth Amendments to the United States Constitution prohibit state sentencing systems that cause the death penalty to be wantonly and freakishly imposed. *Lewis v. Jeffers,* 497 U.S. 764, 774, 110 S.Ct. 3092, 3099, 111 L.Ed.2d 606, 618 (1990).

> [I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates standardless sentencing discretion. It must channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death.

Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398, 406 (1980) (Stewart, J., plurality opinion) (citations and quotations omitted).

"A State's definitions of its aggravating circumstances – those circumstances that make a criminal defendant 'eligible' for the death penalty – therefore play a significant role in channeling the sentencer's discretion." *Lewis,* 497 U.S. at 774, 110 S.Ct. at 3099, 111 L.Ed.2d at 619. To satisfy constitutional mandates, an aggravating circumstance must meet two basic requirements. First, it "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant,* 462 U.S. at 877, 103 S.Ct. at 2742, 77 L.Ed.2d at 249-50. Second, "the aggravating circumstance may not be unconstitutionally vague." *Tuilaepa,* 512 U.S. at ___, 114 S.Ct. at 2635, 129 L.Ed.2d at 759. A challenged provision is impermissibly vague when it fails to adequately inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with open-ended discretion. *Maynard v. Cartwright,* 486 U.S. 356, 361-62, 108 S.Ct. 1853, 1858, 100 L.Ed.2d 372, 380 (1988).

As noted above, under the South Dakota sentencing statutes, the jury may not recommend a sentence of death unless it finds at least one aggravating circumstance beyond a reasonable doubt. South Dakota includes the following aggravating circumstance in its statutory scheme:

> The offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim[.]

SDCL 23A-27A-1(6).[5]

The State alleged "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved . . . depravity of mind." SDCL 23A-27A1(6). In its sentencing instructions to the jury, the trial court defined depravity of mind as follows:

> Depravity of mind is a reflection of an utterly corrupt, perverted, or immoral state of mind *at the time of the murder.* In determining whether the offense of First Degree Murder in this case involved depravity of mind on the part of the Defendant, you may consider the age and physical characteristics of the victim and you may consider the actions of the defendant prior to, *during* and after the commission of the murder. In order to find that the offense of First Degree Murder involved depravity of mind, you must find that the Defendant, as a result of utter corruption, perversion, or immorality, committed torture upon the living victim; or subjected the body of the deceased victim to mutilation or serious disfigurement; *or relished the murder; or inflicted gratuitous violence upon the victim; or the senselessness of the crime; or the helplessness of the victim. If acts occurring after the death of the victim are relied upon by the state to show depravity of mind of the Defendant, such acts must be shown to have occurred so close to the time of the victim's death, and must have been of such a nature, that the*

[5] In 1995, the legislature added the following sentence to SDCL 23A-27A-1(6): "Any murder is wantonly vile, horrible, and inhuman if the victim is less than thirteen years of age." 1995 S.D.Sess.L. ch. 132.

> *inference can be drawn beyond a reasonable doubt that the depraved state of mind of the murderer existed at the time the fatal blows were inflicted upon the victim.* (Emphasis added.)

Rhines submitted an alternative definition of depravity of mind that did not include the italicized language. The trial court rejected this instruction. Rhines contends the trial court's lengthier definition of depravity of mind was so vague and overbroad as to violate the "cruel and unusual punishment" clause of the Eighth Amendment and the due process guarantees of the Fourteenth Amendment to the United States Constitution.

Rhines correctly notes there are essentially six separate definitions of depravity of mind in the trial court's instructions. They are that: (1) the defendant committed torture upon the living victim; (2) the defendant subjected the body of the deceased victim to mutilation or serious disfigurement; (3) the defendant relished the murder; (4) the defendant inflicted gratuitous violence upon the victim; (5) the senselessness of the crime; or (6) the helplessness of the victim. He specifically objects to the inclusion of the last two phrases, which ask the jury to consider the "senselessness of the crime" or the "helplessness of the victim" as distinct definitions of depravity of mind. Rhines argues virtually every murder satisfies these definitions. He reasons the jury's finding of depravity of mind was likely based on these vague and overbroad phrases, since the other factors listed in the instruction did not apply. Rhines urges reversal of the death sentence for this reason.

There is little doubt that the language of SDCL 23A-27A-1(6), by itself, is vague and overbroad. In *Godfrey,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398, the Court

considered a provision identical to South Dakota's "outrageously or wantonly, vile, horrible or inhuman" circumstance. The trial court in *Godfrey* simply quoted the aggravating circumstance in its instructions to the jury and provided no additional definitions or explanations concerning this aggravating factor. 446 U.S. at 426, 100 S.Ct. at 1764, 64 L.Ed.2d at 405. The jury found beyond a reasonable doubt that the two murders committed by the defendant were "outrageously or wantonly vile, horrible and inhuman" and imposed the penalty of death. 446 U.S. at 426, 100 S.Ct. at 1764, 64 L.Ed.2d at 405. The Georgia Supreme Court affirmed the sentence, without applying any limiting construction to the aggravating circumstance. 446 U.S. at 432, 100 S.Ct. at 1767, 64 L.Ed.2d at 408-09. On appeal, the United States Supreme Court invalidated the death sentence. 446 U.S. at 433, 100 S.Ct. at 1767, 64 L.Ed.2d at 409. Justice Stewart, writing for the plurality, condemned the trial court's bare reiteration of the statutory aggravating circumstance in its charge to the jury. 446 U.S. at 428-29, 100 S.Ct. at 1765, 64 L.Ed.2d at 406-07. He reasoned that the statutory provision, by itself, failed to give the jury adequate guidance in imposing the death penalty and therefore created the likelihood of an arbitrary and capricious result. 446 U.S. at 428-29, 100 S.Ct. at 1765, 64 L.Ed.2d at 406-07; *see also Espinosa v. Florida,* 505 U.S. 1079, 1080-82, 112 S.Ct. 2926, 2927-28, 120 L.Ed.2d 854, 858-59 (1992) (stating simple charge to jury that murder was "especially wicked, evil, atrocious or cruel" did not satisfy constitutional requirements); *Maynard,* 486 U.S. at 363-64, 108 S.Ct. at 1859, 100 L.Ed.2d at 382 (invalidating "especially heinous, atrocious, or cruel" aggravating factor where no additional limiting instruction was given).

Finding the statutory language is vague and overbroad, as the *Godfrey* Court did, does not necessarily establish a constitutional violation. *Walton,* 497 U.S. at 653-54, 110 S.Ct. at 3057, 111 L.Ed.2d at 528. If a state court further defines and limits those otherwise vague and overbroad terms so as to provide adequate guidance to the sentencer, then constitutional requirements are satisfied. *Id.* In this case, we hold that the trial court's definition of depravity of mind does not meet these mandates.

In *State v. Palmer,* 224 Neb. 282, 399 N.W.2d 706, 731-32 (1986), *cert. denied,* 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987), the Nebraska Supreme Court approved a definition for "exceptional depravity" that is nearly identical to the "depravity of mind" definition given in this case. The *Palmer* court devised the following limiting instruction:

> [I]n determining whether the death penalty may be imposed, we hold that "exceptional depravity" in a murder exists when it is shown, beyond a reasonable doubt, that the following circumstances, either separately or collectively, exist in reference to a first degree murder: (1) apparent relishing of the murder by the killer; (2) infliction of gratuitous violence on the victim; (3) needless mutilation of the victim; (4) senselessness of the crime; or (5) helplessness of the victim.

Id.

In a subsequent appeal challenging the validity of the "exceptional depravity" circumstance, the Eighth Circuit Court of Appeals rejected the Nebraska Supreme Court's limiting instruction. *Moore v. Clarke,* 904 F.2d 1226, 1232-33 (8th Cir.1990), *reh'g denied,* 951 F.2d 895 (8th Cir.1991), *cert. denied, Clarke v. Moore,* 504 U.S. 930, 112 S.Ct. 1995, 118 L.Ed.2d 591 (1992). The court reasoned

that "senselessness of the crime" and "helplessness of the victim" were vague criteria that failed to adequately guide the sentencer's discretion. 904 F.2d at 1232. The court wrote:

> All murder victims could be characterized as "helpless" as evidenced by the fact that they were murdered . . . . "[H]elplessness" is too broad to be useful. Furthermore, . . . "senselessness of the crime" has no objective meaning. If senselessness of the crime were sufficient to permit a death penalty, virtually all murderers would be on death row.

Id. at 1231-32.

Arizona courts have similarly disapproved "senselessness of the crime" or "helplessness of the victim" as an independent measure of depraved conduct. *State v. Johnson,* 147 Ariz. 395, 710 P.2d 1050, 1056 (1985) (holding the senselessness of the killing in itself is not enough to satisfy the "especially heinous, or depraved" aggravating circumstance). *State v. Smith,* 146 Ariz. 491, 707 P.2d 289, 301 (1985) (ruling that absent additional aggravation, neither the senselessness of the crime nor the helplessness of the victim can alone make the offense especially heinous or depraved). *See also State v. White,* 395 A.2d 1082, 1090 (Del.1978) (holding the defenselessness of the victim is an unconstitutionally vague aggravating circumstance). We therefore hold that the depravity of mind circumstance, as limited by the trial court's instruction, did not adequately channel the sentencer's discretion as required by the state and federal constitutions. The effect of our holding is considered later in this opinion.

ISSUE 10.

Did the trial court err in its instructions to the jury regarding SDCL 23A-27A-1(3), which permits the imposition of the death penalty if "the defendant committed the offense for himself or another, for the purpose of receiving money or any other thing of monetary value"?

The State alleged, as an aggravating circumstance, that Rhines committed the murder for himself for the purpose of receiving money. SDCL 23A-27A-1(3). The trial court instructed the jury in pertinent part:

> Before you may find that this aggravating circumstance exists in this case, you must find, beyond a reasonable doubt, that each of the following elements of this aggravating circumstance are proven by the evidence:
>
> 1. That the Defendant committed the murder for himself; and
>
> 2. That he committed the murder for the purpose of receiving money.

Rhines had proposed a jury instruction which would have further defined the elements of this circumstance with the following language:

> It is not sufficient if you merely conclude that the murder was committed during the course of the commission of a burglary, or that the murder was committed only to enable the defendant to retain possession of money already obtained.

The trial court refused this proposed instruction.

In addition to the pecuniary gain circumstance, the State also alleged that the offense "was committed for the

purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another." SDCL 23A-27A-1(9). Rhines does not dispute that he murdered Schaeffer to cover up Rhines' identity as the burglar and assailant so as to satisfy this aggravating circumstance. However, he contends the aggravating circumstance of "murder for the purpose of receiving money" should not apply, because (1) aggravating circumstances should not overlap so that the same facts can satisfy more than one circumstance; (2) the receipt of money was a result, rather than a cause, of Schaeffer's murder; (3) the murder was not part of a larger preexisting plan to obtain the money; and (4) Rhines had possession of the money before Schaeffer arrived, so the murder was not necessary to get the money.

We reject Rhines' assertions of error. First, we do not agree that the sentencer is restricted to finding only one motive for capital murder. The jury may properly consider and find two conceptually distinct aggravating circumstances. Here, the State alleged that Rhines killed Schaeffer to silence a witness and to receive money – two separate motives for murder which could exist independent of one another.

Second, we do not agree that the facts fail to satisfy the pecuniary gain circumstance for any of the reasons listed by Rhines. Our review of the evidence demonstrates that Rhines did not have possession of all of the money when he killed Schaeffer and that obtaining this money was a motive for the murder. As an employee of Dig'Em Donuts, Schaeffer was responsible for collecting money from the West Main Street store and transporting it to the other Dig'Em Donut shops in the area. He was regarded as a trusted employee. It is reasonable to infer that Schaeffer

would not have passively permitted Rhines to take the money without attempting to contact the police or otherwise stop the theft. By murdering Schaeffer, Rhines not only silenced a witness, he also facilitated receipt of the money. Additionally, although Rhines may not have intended to kill anyone when he entered the shop, the evidence suggests his intentions changed once he heard someone entering the store. Detective Allender testified that Rhines "was beginning to take the money" when he heard the door to the shop being opened. He retrieved his knife and waited behind the office door. Importantly, he did not wait until Schaeffer had seen or identified him. After explaining to the interrogating officers how he had stabbed and bound his victim, Rhines told them of his continued theft of the store:

> Rhines: I went back in the office and finished getting, finished getting what money I could find. About $1,700. Actually about um, about, oh probably 16, 15-1600 out of there. Change fund, basically.
>
> Allender: Yeah. And then
>
> Rhines: Cleaned out the change fund on the wall. Went over, used the phone . . . .

Based on the evidence at trial, we cannot conclude that Rhines had possession of all of the stolen money prior to the killing or that the theft was simply a result rather than a cause of Schaeffer's death.

ISSUE 11.

Was the evidence insufficient to support the jury's finding that Rhines tortured Schaeffer?

The jury found that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved the torture of Schaeffer. Rhines disputes this finding, arguing the evidence presented at trial was insufficient to show beyond a reasonable doubt that he tortured his victim. He notes the fact Schaeffer suffered pain or anticipated the prospect of death is not sufficient, because torture requires the intentional infliction of pain beyond that necessary to cause death. He claims the wounds inflicted on Schaeffer were designed to cause death, not unnecessary pain, and any suffering experienced by Schaeffer was incident to death.

When reviewing the sufficiency of the evidence, we must consider the evidence in the light most favorable to the verdict. *State v. Buller,* 484 N.W.2d 883, 889 (S.D.1992) (citing *State v. Ashker,* 412 N.W.2d 97, 105 (S.D.1987)), *cert. denied,* 506 U.S. 887, 113 S.Ct. 248, 121 L.Ed.2d 181 (1992). The jury's verdict will not be set aside if the evidence and all favorable inferences that can be drawn from it support a rational theory of guilt. *Id.* (citing *Ashker,* 412 N.W.2d at 105; *State v. Andrews,* 393 N.W.2d 76, 80 (S.D.1986)).

According to Rhines' statements to police, he was burglarizing Dig'Em Donuts when Schaeffer unexpectedly entered the store. Schaeffer came into the office area of the store and Rhines stabbed him in the abdomen. Schaeffer fell down, thrashed about, and screamed Rhines' name. Rhines stabbed Schaeffer again in the back, piercing his left lung. Rhines then walked Schaeffer out of the office

into the storeroom. Rhines could hear air whistling out of the wound in Schaeffer's back. As Rhines took Schaeffer to the storage area, Schaeffer said, "No, don't. I won't tell." Schaeffer also asked Rhines to call an ambulance for him. Rhines told Allender he thought, "Yeah, right, I am going to call you an ambulance, you bet." Rhines observed that Schaeffer became passive as though he realized he was going to die. Rhines seated Schaeffer on a pallet in the storeroom. He placed Schaeffer's head between his knees and thrust the knife into the base of his skull. Rhines claims Schaeffer continued to breathe and his arms were moving, so he tied Schaeffer's hands behind him. Rhines estimated that Schaeffer's breathing continued for approximately two minutes after inflicting the final knife wound.

A forensic pathologist, Dr. Donald Habbe, testified at the trial. He opined that the first stab wound would not have been fatal to Schaeffer, but would have caused pain and difficulty breathing. Dr. Habbe stated the second stab wound punctured the left lung and would have the same painful effects, with increased difficulty breathing. He also testified that air could possibly whistle through the back of the wound. According to Dr. Habbe, the combination of the first and second stab probably would not have been fatal. The final stab wound cut into Schaeffer's brain stem. Dr. Habbe opined that death would be "near instantaneous." He opined that Schaeffer may have shown some short involuntary movements in his hands and arms after the infliction of the last wound. He stated that he could not determine whether or not Schaeffer's hands were tied before or after the final stab wound to Schaeffer's neck. He did note that the rope around Schaeffer's wrists was tied

very tightly, and that there were abrasions along Schaeffer's left and right wrists.

Under the South Dakota capital sentencing statutes, the jury may not recommend a sentence of death unless it finds at least one aggravating circumstance beyond a reasonable doubt. One aggravating circumstance alleged by the State was that "the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture." SDCL 23A-27A-1(6). In its instructions to the jury, the trial court defined torture as follows:

> Torture occurs when a living person is subjected to the unnecessary and wanton infliction of severe physical or mental pain, agony, or anguish. Besides serious abuse, torture includes serious psychological abuse of a victim resulting in severe mental anguish to the victim in anticipation of serious physical harm. You would not be authorized to find that the offense of First Degree Murder involved torture simply because the victim suffered pain or briefly anticipated the prospect of death. Nor would acts committed upon the body of a deceased victim support a finding of torture. In order to find that the offense of First Degree Murder involved torture, you must find that the Defendant intentionally, unnecessarily, and wantonly inflicted severe physical or mental pain, agony or anguish upon a living victim.

Rhines correctly observes that the trial court's instructions list two essential elements for a finding of torture: (1) the unnecessary and wanton infliction of severe pain, agony, or anguish; and (2) the intent to inflict such pain, agony or anguish. Our review of the evidence shows that both of these elements were satisfied. "Unnecessary pain" implies suffering in excess of what is required to accomplish the murder. *State v. Ramseur,* 106 N.J. 123, 524 A.2d 188, 229

(1987) (citing *State v. Sonnier,* 402 So.2d 650, 658-60 (La.1981), *cert. denied,* 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983)). The defendant who intends to kill his victim instantly or painlessly does not satisfy this requirement, nor does the defendant who only intended to cause pain that is incident to death. *Ramseur,* 524 A.2d at 229-30.

After Rhines inflicted the second non-fatal stab wound, he did not swiftly proceed to end Schaeffer's life. Instead, he brought Schaeffer to his feet and walked him to the storeroom. During this time, Schaeffer begged for his life and asked for medical help. Rhines ignored his pleas. He seated him on a pallet and arranged his body for what Rhines referred to as the *"coup de grace."* Rhines remarked that during this time Schaeffer became passive and seemed to acknowledge his impending death. We cannot agree that Schaeffer's mental and physical anguish during this time was simply pain incident to his death.

Furthermore, one can reasonably infer from the evidence that Rhines bound Schaeffer's hands before he inflicted the third fatal stab wound. Rhines told interrogating officers that he tied Schaeffer's wrists because his breath was whistling out of the wound in his back. However, when the interrogating officers questioned Rhines about the possibility that Rhines bound Schaeffer before the fatal wound to his neck, Rhines' responses were evasive and nonsensical. Furthermore, Dr. Habbe testified that the whistling sound of Schaeffer's breath was consistent with Schaeffer's back wound, but that death after the third wound to the neck would have been "near instantaneous." Further, Dr. Habbe noted abrasions on Rhines' wrists, and the jury could reasonably infer that these

marks were caused or exacerbated by Schaeffer's agonized struggle before his death.

The evidence also shows that Rhines possessed the necessary intent for a finding of torture. When Schaeffer pleaded with Rhines for his life, Rhines did not tell officers of his desire to quickly end his victim's life. Instead, Rhines described his own sarcastic and scornful attitude toward Schaeffer's suffering. Rhines also stated that when he believed Schaeffer had survived the third stab wound, he tied his victim's hands and left him to die. This evidence supports a finding that Rhines intended to cause unnecessary pain to his victim.

ISSUE 12.

Does the jury's consideration of an invalid aggravating circumstance require reversal of the death sentence?

In Rhines' case, the jury found four statutory aggravating circumstances. The jury determined: (1) the offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest under SDCL 23A-27A-1(9); (2) the offense was committed for the purpose of receiving money under SDCL 23A-27A-1(3); (3) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture under SDCL 23A-27A-1(6); and (4) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind, also under SDCL 23A-27A-1(6). Rhines did not challenge the jury's finding that he committed the offense for the purpose of avoiding lawful arrest. Similarly, we have rejected Rhines' claims of error regarding the torture and pecuniary gain circumstances. However, we have concluded that the

depravity of mind circumstance, as defined by the trial court, is constitutionally invalid.

Rhines claims the invalidity of one of the aggravating circumstances found by the jury requires reversal of his death sentence. Alternatively, he argues the Court may uphold the death sentence only if the jury still would have imposed the death sentence without the invalid factors. He alleges the jury's decision to impose the death penalty was a result of the multiple number of aggravating circumstances that were found. Because the invalid aggravating circumstance cannot be excised from the jury's sentence of death, he claims the sentence must be reversed.

In *Zant,* the Court considered whether a defendant's death sentence must be vacated when one of the three statutory aggravating circumstances found by the jury was subsequently held to be invalid by the Georgia Supreme Court. 462 U.S. at 889, 103 S.Ct. at 2748, 77 L.Ed.2d at 257. The Court held that the invalidity of one aggravating circumstance did not require reversal of the death sentence. The Court stressed various factors that were important to its decision. First, the Court noted that the invalid aggravating circumstance did not implicate expressive activity that is protected by the First Amendment or include factors that are totally irrelevant to the sentencing process, such as the race, religion, or political affiliation of the defendant. 462 U.S. at 885, 103 S.Ct. at 2747, 77 L.Ed.2d at 255. Nor did the circumstance involve conduct that should militate in favor of a lesser penalty, such as the defendant's mental illness. 462 U.S. at 885, 103 S.Ct. at 2747, 77 L.Ed.2d at 255. Second, under Georgia law, aggravating circumstances simply identified those offenses that qualify as capital crimes, and the presence of only one circumstance was sufficient to permit

consideration of the death penalty. 462 U.S. at 876-77, 103 S.Ct. at 2742, 77 L.Ed.2d at 249. Third, the same evidence relevant to the invalid circumstance was also admissible for purposes of ruling on the valid aggravating factors. 462 U.S. at 887-89, 103 S.Ct. at 2748-49, 77 L.Ed.2d at 256-57. Fourth, the Georgia death penalty statutes did not instruct the jury to weigh aggravating circumstances and mitigating circumstances against each other in deciding whether to impose a death sentence. 462 U.S. at 890, 103 S.Ct. at 2750, 77 L.Ed.2d at 258. Nor was the jury otherwise instructed to place any particular weight on the number of aggravating circumstances found. 462 U.S. at 891, 103 S.Ct. at 2750, 77 L.Ed.2d at 258. Finally, Georgia law mandated appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality. 462 U.S. at 890, 103 S.Ct. at 2749, 77 L.Ed.2d at 258.

Importantly, as noted earlier, South Dakota's capital sentencing scheme is modeled after Georgia's death penalty statutes. All of the procedural safeguards emphasized in *Zant* are also present in our capital punishment law. First, the depravity of mind circumstance did not encompass conduct that is constitutionally protected, personal characteristics of the defendant that are totally irrelevant to the sentencing process, or conditions that should favor a lesser penalty. Second, aggravating circumstances serve only to narrow the class of offenders eligible for the death penalty, and the existence of only one such circumstance is sufficient to warrant consideration of capital punishment. Third, all of the evidence relevant to the "depravity of mind" circumstance was also properly admitted for purposes of deciding the existence of other valid aggravating factors. Fourth, our statutes do not

require the jury to weigh aggravating circumstances against mitigating factors, and the jury was not instructed to consider the specific number of aggravating factors in deciding whether to render a death sentence. Finally, SDCL 23A-27A-12 mandates this Court to consider whether the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Therefore, in accordance with the Supreme Court's ruling in *Zant,* we hold the invalidity of the "depravity of mind" circumstance does not so taint the penalty proceedings as to mandate reversal of Rhines' death sentence.

ISSUE 13.

Was Rhines' death sentence imposed under the influence of passion, prejudice, or other arbitrary factors?

Rhines contends the jury considered irrelevant or unfairly prejudicial matters when imposing the death penalty. He claims the jury's note to the judge about life imprisonment demonstrates this bias. He specifically focuses on questions about whether prison conditions might allow "distraction from his punishment" and whether he might qualify for work release from prison.[6]

Rhines also contends the trial court failed to adequately respond to the jury's improper concerns. As noted above, the trial court sent the following response to the jury:

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[6] Rhines also reiterates his claim that some of the jury's questions demonstrate a bias against homosexuality. Having previously addressed this allegation, we need not revisit it here.

> Dear Jurors: I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions.

The trial court refused to give an additional instruction proposed by Rhines:

> You are further instructed, however, that you may not base your decision on speculation or guesswork.

Rhines contends that, by failing to give this instruction, the court improperly permitted the jury to speculate about the nature of life imprisonment.

1. Passion, prejudice or other arbitrary factors.

Once the jury has found the existence of an aggravating circumstance beyond a reasonable doubt, our capital sentencing scheme gives jurors broad discretion in deciding whether to impose life imprisonment or a death sentence. *See, e.g., Tuilaepa,* 512 U.S. at ___, 114 S.Ct. at 2636, 129 L.Ed.2d at 761. Indeed, prior to sentencing deliberations, the jury was appropriately instructed: "You may fix the penalty at life imprisonment, if you see fit to do so, for any reason satisfactory to you, or without any reason."

In this context, the jury's questions about work release and "distraction from punishment" do not show that they considered irrelevant or arbitrary factors in rendering a verdict. Their questions directly relate to conditions of confinement under a sentence of life without parole. Prison life was an appropriate topic for discussion when weighing the alternatives of life imprisonment and the death penalty.

2. Trial court's response.

Rhines contends the trial court erred in failing to additionally advise the jury to avoid speculation and guesswork. We find no error. The decision whether to provide further instruction to the jury rests within the sound discretion of the trial court. *Floody,* 481 N.W.2d at 250 (citing *State v. Holtry,* 321 N.W.2d 530, 531 (S.D.1982)).

Although other courts have responded to similar inquiries by instructing jurors to refrain from speculation, *People v. Hovey,* 44 Cal.3d 543, 244 Cal.Rptr. 121, 145-46, 749 P.2d 776, 800 (1988), *cert. denied,* 488 U.S. 871, 109 S.Ct. 188, 102 L.Ed.2d 157 (1988); *People v. Stankewitz,* 51 Cal.3d 72, 270 Cal.Rptr. 817, 842-43, 793 P.2d 23, 48-49 (1990), *cert. denied,* 499 U.S. 954, 111 S.Ct. 1432, 113 L.Ed.2d 483 (1991), the trial court's decision to forego such an instruction was not an abuse of discretion. First, the proposed instruction to avoid speculation and guesswork could inadvertently chill the jury's broad discretion to fix the penalty at life imprisonment "for any reason . . . or without any reason." Second, the instructions given by the trial court fully and accurately advised the jurors of the law governing the case. We can discern no error in simply referring the jurors to these instructions. "'If the court in the exercise of sound discretion concludes that information or further instructions are not required, it may properly refuse such a request.'" *Holtry,* 321 N.W.2d at 531 (quoting *State v. Weinandt,* 84 S.D. 322, 327, 171 N.W.2d 73, 77 (1969)).

ISSUE 14.

Based on the appellate review mandated by SDCL 23A-27A-12, was Rhines' sentence of death lawfully imposed?

In every case where the death penalty is imposed, this Court is required to conduct an independent review of the sentence. SDCL 23A-27A-12. We must determine:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
>
> (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; and
>
> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

SDCL 23A-27A-12.

We begin our review by determining whether the evidence supports any of the aggravating circumstances found by the jury. Rhines does not dispute that he committed the murder to avoid being arrested, thereby satisfying aggravating circumstance SDCL 23A-27A-1(9); there is substantial evidence in the record to support this finding. When describing the murder to Detective Allender and Deputy Sheriff Bahr, Rhines remarked, "leave no witnesses." He also referred to being "caught in the act." When discussing his decision to tie Schaeffer's hands, Rhines remarked, "I just don't want somebody to stand up in the middle of – or call anybody and go dial 911." Furthermore, we have previously concluded the offense was committed for the purpose of receiving money under SDCL

23A-27A-1(3) and the offense involved torture which was wantonly vile, horrible, or inhuman under SDCL 23A-27A-1(6). Clearly, Rhines was eligible for the death penalty.

Nor can we conclude the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. We have rejected Rhines' claims that inadmissible evidence was considered by the jury and that the jury permitted irrelevant facts to taint its verdict. We cannot discern any independent basis for invalidating the jury's sentence. Although Rhines presented mitigating evidence concerning his difficult youth and loving family, the decision to impose the death penalty in spite of this evidence was not arbitrary. Rhines brutally murdered Donnivan Schaeffer so he could steal less than $2,000 in cash and escape responsibility for his crime. The law permits mercy, but does not require it.

Finally, we consider whether Rhines' death sentence is excessive or disproportionate to the penalty imposed in similar South Dakota cases. SDCL 23A-27A-12(3) is patterned after the proportionality review provisions in the Georgia capital punishment statutes. As the United States Supreme Court observed in *Gregg*, provision for proportionality review:

> substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

428 U.S. at 206, 96 S.Ct. at 2940, 49 L.Ed.2d at 893.

As for the mechanics of proportionality review, Rhines argues the pool of similar cases for proportionality review should encompass all homicide cases that were prosecuted or could have been prosecuted under the State's current capital punishment scheme. He reasons that prosecutorial discretion is an important factor that this Court must consider when ruling on proportionality. The State argues the pool of similar cases should be limited to those South Dakota cases proceeding to the capital punishment phase, regardless of whether a death sentence was actually imposed. There are seven other South Dakota cases that have proceeded to death penalty deliberations.

We conclude that similar cases for purposes of SDCL 23A-27A-12(3) are those cases in which a capital sentencing proceeding was actually conducted, whether the sentence imposed was life or death. "[B]ecause the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar ... are those in which imposition of the death penalty was properly before the sentencing authority for determination." *Tichnell v. State,* 297 Md. 432, 468 A.2d 1, 15-16 (1983), *cert. denied,* 466 U.S. 993, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1984). *Accord, Flamer v. State,* 490 A.2d 104, 139 (Del.1983), *cert. denied,* 474 U.S. 865, 106 S.Ct. 185, 88 L.Ed.2d 154 (1985).

Since the enactment of South Dakota's current death penalty statute in 1979, eight capital sentencing proceedings have taken place. In six of those cases, the jury imposed life sentences. In Rhines' case and one other, the jury returned a verdict of death. We will briefly set forth the facts of each of these other cases so as to provide a foundation for our review.

State v. Adams

Howard Adams and Jimmy Lee Boykin kidnapped, robbed and murdered DuWayne Jensen, a stranger who was delivering newspapers early in the morning on June 19, 1986. Jensen's jaw and windpipe had been fractured and both of his eyes were blackened. The cause of his death was multiple stab wounds. The State sought the death penalty, alleging the offense was committed for the purpose of receiving money or any other thing of monetary value and the offense was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. The jury only found the aggravated battery circumstance and sentenced Adams to life imprisonment. Mitigating circumstances included Adams' deprived childhood, a history of alcohol abuse, and use of alcohol immediately prior to the crime.

State v. Bittner

On March 20, 1982, two police officers responded to a complaint that Steven Bittner had physically abused his girl friend in the home the couple shared. As the officers proceeded to the upstairs portion of the house, Bittner bounded down the stairs and stabbed both officers. One of the officers died as a result of his injuries.

The State sought the death penalty, alleging one aggravating circumstance – that the offense was committed against a law enforcement officer while in the performance of his duties. The jury sentenced Bittner to life imprisonment, without finding the existence of any statutory aggravating circumstances. Bittner established various mitigating circumstances, including abuse and neglect as a child, a history of alcohol or drug abuse, use of

alcohol immediately prior to the crime, and a disavowal of any intent to deliberately kill the officer.

State v. Helmer

The State alleged that William J. Helmer killed an acquaintance, Randy Dixon, by shooting Dixon in the head. The State also claimed that, after killing Dixon, Helmer cut off Dixon's head and hands with an axe. Helmer presented evidence that he had experienced mental problems for a number of years. Testimony indicated that Helmer suffered from post-traumatic stress disorder at the time of Dixon's murder. There was also evidence indicating Dixon had been abusive toward Helmer and may have stolen property from Helmer.

The State sought the death penalty, asserting the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim and the offense was committed for the purpose of receiving money or anything of monetary value. The jury convicted Helmer of first-degree murder and sentenced Helmer to life imprisonment.

State v. Moeller

The State alleged Moeller anally and vaginally raped a nine-year-old girl and stabbed her to death. The State sought the death penalty, claiming the offense was outrageously or wantonly vile, horrible or inhuman in that it involved an aggravated battery to the victim. The jury convicted Moeller of rape and first-degree murder. The jury also found the existence of the aggravated battery circumstance and imposed a sentence of death.

State v. Smith

During the course of a bank robbery, James Elmer Smith shot a woman who failed to follow his order to lie down on the floor. The woman died within a few minutes of receiving the gunshot wound. The State sought the death penalty, alleging three aggravating circumstances: (1) the defendant knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person; (2) the offense was committed for the purpose of receiving money or any other type of monetary value; and (3) the offense was committed by a person in, or who has escaped from, the lawful custody of a law enforcement officer or place of lawful confinement. The jury convicted Smith of first-degree murder and returned a verdict of life imprisonment.

State v. Swallow

Accompanied by two others, Edwin Swallow went to the home of Conrad Wilson, an illicit drug dealer. A shoot-out ensued. Wilson was found, barely alive, on the porch of the house. He eventually died of his injuries. Wilson's seventeen-year-old daughter, who was not involved in the drug trade, was found dead from a single shotgun blast.

The State sought the death penalty against Swallow, alleging the murder of Wilson's daughter was committed by a person who had a substantial history of serious assaultive criminal convictions and was committed for the purpose of receiving money or any other thing of monetary value. Mitigating evidence showed Swallow was twenty-two years old, had a history of drug abuse, and that a co-perpetrator had received a sentence of sixty-five years.

There was also testimony indicating Wilson initiated the shootout by firing at Swallow's companions.

The jury convicted Swallow of one count of first-degree manslaughter for the death of Wilson and one count of first-degree murder for the death of Wilson's daughter. The judge imposed a life sentence for the manslaughter conviction. The jury imposed a life sentence without possibility of parole for the first-degree murder conviction, without indicating whether the aggravating circumstances were satisfied.

State v. Waff

David Waff killed Russell Keller in exchange for a payment of $1500 from Keller's business partner. Waff had shot Keller once in the head and stabbed him eight times. The State sought the death penalty, asserting the murder was committed for the purpose of receiving money or other things of monetary value and the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. The jury found Waff guilty of first-degree murder and sentenced him to life imprisonment.

The law demands individualized sentencing. *Tuilaepa,* 512 U.S. at ___, 114 S.Ct. at 2635, 129 L.Ed.2d at 760. The jury's verdict in any capital case is necessarily premised on the unique facts before it. Yet, all defendants facing the death penalty are entitled to fairness and reasonable consistency in its imposition. *State v. Bey,* 137 N.J. 334, 645 A.2d 685, 689 (1994), *cert. denied,* 513 U.S. 1164, 115 S.Ct. 1131, 130 L.Ed.2d 1093 (1995). "'[A] death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than

death for committing factually similar offenses in the same jurisdiction.'" *Id.* (quoting *State v. Marshall,* 130 N.J. 109, 613 A.2d 1059, 1070 (1992)).

A dissenting opinion implies that Rhines' sentence is disproportionate because he is one of only two defendants to have received a verdict of death. We respectfully suggest this reasoning is flawed. First, the fact that Rhines is among the first to receive a death sentence does not signify that his sentence is disproportionate. Otherwise, the death penalty itself would be nullified. Second, a death sentence should not be invalidated simply because a jury determined that another defendant, who committed an analogous crime, deserved mercy. Proportionality review focuses not only on the crime, but also on the defendant. SDCL 23A-27A-12(3). *See State v. Benn,* 120 Wash.2d 631, 845 P.2d 289, 317 (1993) (quoting *State v. Lord,* 117 Wash.2d 829, 822 P.2d 177, 223 (1991)) ("Simply comparing numbers of victims or other aggravating factors may superficially make two cases appear similar, where in fact there are mitigating circumstances in one case to explain either a jury's verdict not to impose the death penalty or a prosecutor's decision not to seek it."), *cert. denied,* 510 U.S. 944, 114 S.Ct. 382, 126 L.Ed.2d 331 (1993).

We conclude the death sentence is not excessive or disproportionate in Rhines' case. First, we note Rhines' offense involved the existence of three separate aggravating circumstances. Only one other case, *State v. Smith,* 477 N.W.2d 27 (S.D.1991), alleged the presence of three aggravating factors. Marked distinctions between Rhines' case and *Smith* justify the juries' different verdicts. In *Smith,* the victim died quickly from a single gunshot delivered swiftly and unexpectedly by Smith. In contrast, Schaeffer did not die quickly from a single wound. Rhines

first stabbed him in the stomach, which caused Schaeffer to collapse to the floor, screaming and writhing in pain. After Rhines pierced Schaeffer's lung with the second thrust of his knife, Schaeffer pleaded for his life. According to Rhines, when he assisted Schaeffer to the storeroom to deliver the "*coup de grace,*" Schaeffer seemed to anticipate his own death. The disparity in suffering endured by victims is an important and legitimate consideration when evaluating the proportionality of a death sentence.

Additionally, the nature of the evidence in this case sets it apart from any other capital case in this state. In the seven other cases where the death penalty was considered, the prosecution's evidence was circumstantial or involved testimony by third-persons who observed the defendant's wrongdoing or who heard inculpatory statements by the defendant. In this case, the jury heard Rhines' own description of his crime. His arrogant and cold-blooded attitude toward his offense was made shockingly apparent in his own words and in his own voice. Rhines described the stabbing of Schaeffer in chilling, clinical detail. He told about Schaeffer "thrashing" and "screaming" after the first stab wound. He said air whistled out of the wound in Schaeffer's back, and called it a "sucking back wound." As to the final death blow, Rhines remarked: "Sat him down and put him basically, his head between his legs and applied the knife to the back of the neck where the skull joins the spinal column. Right in the joint at the spinal column. In kind of upward, up and in . . . . Attempted to reach the small brain . . . " Then Rhines told the officers, " . . . he was still breathing, I didn't know what I had. I've never stabbed anybody to death. I've never stabbed anybody, period. You guys seen anybody get stabbed to death? Know what it takes? Quit fighting very

quickly, but, you don't die very quickly." When the officers told Rhines that a pathologist had suggested Schaeffer might have been tied up before the last stab wound, Rhines stated, "Too bad he wasn't there. To watch." Then Rhines burst into laughter. In explaining Schaeffer's movements after the last wound, Rhines drew an analogy to butchered chickens. Rhines laughed intermittently throughout the first interview, usually in reference to witnesses the officers had not spoken to or items of evidence they had not found. At one point he remarked caustically, "I try not to condescend." During Rhines' lengthy taped confessions, he did not spontaneously express any feeling of remorse for Schaeffer's death. When finally asked, "Are you sorry Donnivan's dead now?" Rhines simply responded, "Yeah." He then proceeded to tell the officers that he wanted to "get off."

Faced with such compelling evidence of the defendant's moral culpability and apparent lack of sincere remorse, we conclude the death sentence imposed on Rhines was neither excessive nor disproportionate to the penalty imposed in similar cases in South Dakota.

Affirmed.

GILBERTSON, J., and JOHNSON, Circuit Judge, concur.

SABERS and AMUNDSON, JJ., dissent.

JOHNSON, Circuit Judge, sitting for KONENKAMP, J., disqualified.

SABERS, Justice (dissenting).

The issue is: Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

For the reasons stated herein, the sentence of death is excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. SDCL 23A-27A-12(3).

SDCL 23A-27A-12 provides the factors to be reviewed by the Supreme Court regarding a death sentence. For the purpose of this case, I will assume that this death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and that the evidence supports the jury's finding of a statutory aggravating circumstance as enumerated in SDCL 23A-27A-1.

However, as indicated above, SDCL 23A-27A-12(3) mandates that the Supreme Court affirmatively determine that this death sentence is neither excessive nor disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant. In fact, unless we affirmatively determine that the death sentence is neither excessive nor disproportionate to the penalties imposed in criminal cases, then, in that event, SDCL 23A-27A-14 requires that "the court shall sentence such person to life imprisonment." That is what must be done here.

Before considering the penalties imposed in similar cases, it is very important to point out that in *Pulley v. Harris,* 465 U.S. 37, 50-51, 104 S.Ct. 871, 879, 79 L.Ed.2d 29, 40-41 (1984), the United States Supreme Court held that the Constitution of the United States does not require proportionality review. In other words, it was not

necessary for the South Dakota Legislature to enact SDCL 23A-27A-12(3) requiring mandatory proportionality review by the South Dakota Supreme Court. I submit that it was a mistake for the South Dakota Legislature to require mandatory proportionality review when it was not required by the United States Constitution. This statement presumes, of course, that the death penalty was desired by the legislature in most murder cases.

Most murders are, for the most part, full of aggravating circumstances and at least for death penalty proponents, more than adequate for capital punishment. However, when our legislature has clearly said that those aggravating circumstances are *not enough,* and that, in addition, there must be mandatory proportionality review by the Supreme Court, it is clear that no death sentence shall be imposed unless we can affirmatively determine that the death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In other words, even if we were to conclude that this defendant and this defendant's crime deserves death, we cannot impose it because it is excessive and disproportionate to the penalties imposed in similar cases. That is our task under SDCL 23A-27A-12(3). It did not have to be that way, but it is. The United States Constitution does not require it but the South Dakota Legislature does.

Concerning the mechanics of proportionality review, the majority opinion states:

> Rhines argues the pool of similar cases for proportionality review should encompass all homicide cases that were prosecuted or could have been prosecuted under the State's current capital punishment scheme. He reasons that prosecutorial discretion is

an important factor that this Court must consider when ruling on proportionality. The State argues the pool of similar cases should be limited to those South Dakota cases proceeding to the capital punishment phase, regardless of whether a death sentence was actually imposed. There are seven other South Dakota cases that have proceeded to death penalty deliberations.

The majority opinion promptly proceeds to adopt the State's argument without any consideration of other murder cases and without any reasoned analysis.

It seems clear to me that if proportionality review is to be meaningful, as intended by our legislature, the pool of "similar cases" must include at a minimum *all* reported murder cases. This would present no great difficulty in South Dakota, where the crime of murder is still infrequent, if not uncommon. Generally, we have less than ten reported murder cases per year. Prosecutorial discretion and plea bargaining should be factors for consideration, even if not controlling, and the cases disposed of by those methods should not be *automatically* omitted.[7] At any rate, to limit the pool of "similar cases" to the seven as the majority does is, in itself, arbitrary and unreasonable.

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[7] Consider for a moment the recent "murder for hire" case of Mary K. Ross in Sioux Falls. The man who hired the killing and the two killers received life sentences as a result of pleas despite the fact that she was stabbed numerous times over a substantial period of time. She lived long enough to call the 911 operator to report that she was being killed and that her baby was in the next bedroom.

Several years ago, a young man brutally raped and murdered a nine-year-old Sioux Falls Argus Leader paper girl and received a life sentence.

Under the majority's view, these cases would *never* be considered in its pool of similar cases.

It takes no great memory to recall numerous "similar cases" where the facts and the aggravating circumstances were at least as hideous as in Rhines' case. In fact, the major distinguishing feature in all other cases is that the penalty was life in prison or less, and not death. Consider for a moment, the following cases:

1. *State v. Ashker,* 412 N.W.2d 97 (S.D.1987).

Lewis Ashker and Curt Novaock were convicted of first-degree murder of the death of Jerry Plihal in Delmont. Plihal had struggled with his attackers and had been stabbed numerous times. Plihal's guns were missing, but not found by the authorities.

2. *Jenner v. Leapley,* 521 N.W.2d 422 (S.D.1994).

In 1986, Jackie Sjong was found dead under a bridge near Spearfish, the victim of four bullets fired at close range, from two different weapons. Sjong was "picked up" by Michael Jenner in California and brought to Sturgis for execution because he had "ratted" on a fellow club member.

Michael Jenner and Richard Elliott, members of an "outlaw" motorcycle club, were convicted of first-degree murder and each received a life sentence.

3. *State v. Braddock,* 452 N.W.2d 785 (S.D.1990).

Edward Braddock was convicted of murder and sentenced to life imprisonment for killing Douglas Cramer by shooting him 8 times with an AK-47 assault rifle at the Edgemont city dump. He claimed Cramer owed him money.

4. *State v. Rough Surface,* 440 N.W.2d 746 (S.D.1989).

Donald Rough Surface received life in prison for murder, rape, robbery and assault of his uncle. The

victim's body was found naked, bloody, badly beaten, and burned in the crawl space beneath a grain elevator in Mobridge. The victim had also been raped and robbed.

5. *State v. Bradley,* 431 N.W.2d 317 (S.D.1988).

Jamie Thunder Hawk's body was found in a roadside ditch near Baltic in 1986. Her head had been severed with a knife. There was testimony that she had been abused and tortured over a period of time by Bradley and that on the day of her death, she was kicked, raped and strangled to death. Bradley received life imprisonment.

6. *State v. Miller,* 429 N.W.2d 26 (S.D.1988).

Todd Miller was convicted of murder, kidnapping, possession of ransom money and forgery for the death of his "friend" Michael Kinney near Aberdeen. He received life sentences.

7. *State v. Corder,* 460 N.W.2d 733 (S.D.1990).

Ronald Corder and Harvey Ernst each received a life sentence for the brutal beating of Clifford Hirocke near Vermillion.

8. *State v. Davi,* 504 N.W.2d 844 (S.D.1993).

Scott Davi received life in prison for convictions of murder and rape of his ex-wife, and burglary of her apartment in Sioux Falls. She had been brutally beaten, raped and strangled.

9. *State v. Phillips,* 489 N.W.2d 613 (S.D.1992).

Darlene Phillips received a life sentence in her conviction of conspiracy to commit murder. After several aborted attempts with poison and fire to kill her ex-husband for whom she was caring, she and others smothered him with a pillow in Lemmon.

10. *State v. Henjum,* 1996 SD 7, 542 N.W.2d 760 (S.D.1996).

Finally, as recently as February 27, 1994, in Mitchell, Lawrence Henjum, shot his friend and roommate, Mark Nelson, in the head with a rifle for no apparent reason. The murder charge was dropped to manslaughter, he pled guilty and received forty-five years.

Minimal research discloses approximately 80 reported murder cases since 1978, many of which are as hideous as Rhines' case. *None* of them resulted in a death sentence. *None* of them are even considered in the majority opinion.

Even if the pool of similar cases was limited to the seven cases used by the majority, the facts and aggravating circumstances of *Rhines* are more common than exceptional. Although the specific details vary, the brutality of each killing is similar. In fact, viewed objectively, all of them were hot or cold blooded murders or executions against defenseless victims. The only real distinguishing feature is that all of those murderers received life in prison. Therefore, Rhines' death sentence is disproportionate *and* excessive in comparison.

As stated in the majority opinion: "[A] death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses in the same jurisdiction." *State v. Marshall,* 130 N.J. 109, 613 A.2d 1059, 1070 (1992). To paraphrase, Rhines' death sentence is comparatively excessive *because all* other defendants with similar characteristics received sentences other than death for committing factually similar offenses in the same jurisdiction.

Accordingly, it is pure fiction to say that Rhines' death sentence is neither excessive nor disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. Therefore, we have no choice but to reverse and remand because, in these circumstances, the law requires that "the court shall sentence such person to life imprisonment." SDCL 23A-27A-14.

AMUNDSON, Justice (dissenting).

I respectfully dissent on Issue 14, for I believe the majority's comparative proportionality review universe or pool is too restrictive. When I embarked on this mandated review, I felt much like Benjamin N. Cardozo when he stated:

> I was much troubled in spirit in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile . . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

Benjamin N. Cardozo, *The Nature of the Judicial Process,* 166 (1921).

One of the fundamentals of proportionality review is to avoid "death sentences imposed . . . wantonly or freakishly." *Gregg v. Georgia,* 428 U.S. 153, 224, 96 S.Ct. 2909, 2948, 49 L.Ed.2d 859, 903 (1976) (White, J., concurring).

In order to avoid such a result, a larger pool needs to be used for comparison to ensure we properly perform this ominous task. This maiden voyage provides an opportunity to establish a procedure for evaluating the appropriateness of a death sentence. A court should not lose sight of the fact that the purpose of this review is fairness notwithstanding the nature of the crime.

In *State v. Mercer,* 618 S.W.2d 1, 21 (Mo.1981) (Seiler, J., dissenting) it was noted:

> By "similar cases" is meant similar capital murders, not limited only to those where both death and life imprisonment were submitted to the jury and then affirmed on appeal, whichever way the case went on punishment. The evil deed is the murder and what accompanied it and that, as well as the defendant, is what must be looked at in comparing what one defendant received in punishment under a capital murder charge with what another received. The fact that a capital murder defendant does not get the death penalty or gets a new trial or that the state waived the death penalty in his case or that his case is still pending before us does not mean that we can ignore his case in making our comparison. Once we accept the idea, as we must, that the death penalty cannot be inflicted at random, or arbitrarily or inconsistently, then necessarily we must take into consideration all capital murders we know about.

Our state legislature mandates us to carry out proportionality review. SDCL 23A-27A-12. Since 1979, SDCL 23A-27A-8 has required this court to accumulate the records of all capital felony cases that we deem appropriate. The information available at this time tracks cases from 1981 until 1993. Our records contain forty-eight capital felony cases that we deemed appropriate to accumulate. Beyond

the records assembled in Pierre at this time, there are at least four other cases that could be included in this accumulation.[8] What is the majority's rationale for culling this established pool to seven? Since the legislature has mandated this review, it must be meaningful or the result will be suspect. As Justice Utter stated in his dissent in *State v. Benn,* 120 Wash.2d 631, 845 P.2d 289, 326-27 (1993):

> Without such review, the death penalty, like lightning, will strike some, but not others, in a way that defies rational explanation. The severity of the death penalty, its irrevocability, and our statutory mandate, require us to assess carefully whether the death penalty has been imposed arbitrarily. We cannot, under the statute, simply defer to a jury's sentencing determination.

SDCL 23A-27A-12(3) states that we are to consider both the crime and the defendant when conducting our comparative review, not just that a capital proceeding took place. In South Dakota, only two people since 1979 have been sentenced to death out of at least fifty-two eligible criminals. In conducting comparative proportionality review, if we required a case to be on all fours with the other cases in order for them to be similar, I submit that would be impossible. By using the pool already assembled by this court, it gives notice to the parties involved in the

[8] *State v. Helmer,* 1996 SD 31, 545 N.W.2d 471 (Convicted July 8, 1994. Victim was shot and then decapitated and hands removed.); *State v. Henjum,* 1996 SD 7, 542 N.W.2d 760 (Pleaded guilty to manslaughter in the first degree sometime in 1994. Defendant shot victim with no provocation.); *State v. New,* 536 N.W.2d 714 (S.D.1995) (Convicted May 2, 1994, of second-degree murder. New stated he did not actually murder, just witnessed.); *State v. Larson,* 512 N.W.2d 732 (S.D.1994) (Convicted November 21, 1992, of second-degree murder. Victim shot while driving down Interstate.).

litigation as to what cases will be considered. Then, the litigants can make their argument on this issue based on that pool. Otherwise, a defendant does not find out what are similar cases until the decision is handed down. There is no statute in South Dakota that defines "similar case" nor does any statute provide us with a standard for performing the mandated review. On the other hand, all of the cases which I recommend be included in the pool have one similarity, namely, a wrongful taking of another person's life. By employing such a pool, this court would be proceeding with appropriate care and caution when making a decision involving life or death of a human being.

In conclusion, I might personally feel Rhines has earned the sentence imposed by the jury, but that is not the issue. The issue is whether the death penalty is being imposed uniformly and not arbitrarily. This issue cannot be resolved by only considering cases where capital sentencing proceedings were actually conducted.

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
: SS		SEVENTH
)		JUDICIAL CIRCUIT
COUNTY OF PENNINGTON)		
CHARLES RUSSELL RHINES,)		Civ. No. 96-1070
Petitioner,)		FINDINGS OF FACT,
)		CONCLUSIONS OF
v.)		LAW AND ORDER
)		
DOUGLAS WEBER, Warden)		(Filed Nov. 16, 1998)
of the South Dakota)		
State Penitentiary,)		
)		
Respondent.)		

INTRODUCTION

The above-entitled matter having come on regularly for hearing before this Court on April 6, 1998; the Petitioner appeared in person and by his attorney Michael Hanson; the Respondent being represented by Deputy Attorney General Robert Mayer and Craig M. Eichstadt and Assistant Attorney's General Grant Gormley and Sherri Sundem Wald; the Honorable Merton B. Tice presiding; testimony and exhibits having been duly received by this Court and the Court having taken judicial notice of Seventh Judicial Circuit Court File, Crim. No. 93-81, *State of South Dakota v. Charles Russell Rhines,* and all records and transcripts intended or pertinent thereto; and the foregoing having been considered by the Court; both parties having presented to the Court testimony of witnesses and exhibits; and authorities and/or arguments for both parties having been presented to the Court; this Court then having duly considered all testimony, evidence, arguments, briefs, records, and files contained herein, and the Court having issued a written decision dated October

8, 1998, denying Petitioner's Application for Writ of Habeas Corpus, which opinion hereby is incorporated by reference, now being fully advised does, pursuant to SDCL 15-6-52, hereby make the following:

FINDINGS OF FACT

1. Twenty-two-year-old Donnivan Schaeffer was found murdered on Sunday, March 8, 1992, in the back storeroom of Dig'Em Donuts. Schaeffer had been stabbed in the abdomen, in the upper left back, and in the back of the neck.

2. On July 27, 1992, Defendant was indicted by a Pennington County Grand Jury in Circuit Court for the Seventh Judicial Circuit on one count of Premeditated First Degree Murder, in violation of SDCL 22-16-4; one count of Felony Murder, in violation of SDCL 22-16-4, and one count of Third Degree Burglary, in violation of SDCL 22-32-8. On August 24, 1992, the State filed an habitual offender information against Defendant. The Honorable John K. Konenkamp presided over the trial.

3. On January 23, 1993, Petitioner Charles Russell Rhines (Rhines) was found guilty by a Pennington County jury of premeditated first degree murder and third degree burglary. On January 26, 1993, the same jury returned a sentence of death by lethal injection finding aggravating circumstances to have existed in connection with the death of Schaeffer.

4. Rhines appealed his conviction to the South Dakota Supreme Court which subsequently affirmed the conviction. *State v. Rhines,* 1996 S.D. 55, 548 N.W.2d 415.

5. On December 5, 1996, Rhines filed an Application for Writ of Habeas Corpus. An Amended Second Application for Writ of Habeas Corpus was filed on September 17, 1997. Attorney Michael Hanson was appointed to represent Petitioner.

6. An evidentiary hearing was held on the amended second petition on April 6, 1998, with subsequent testimony of Michael Butler being introduced by way of deposition on June 5, 1998.

7. This Court issued a written Opinion dated October 8, 1998, which denied the amended application and quashed the writ and the contents of which are hereby incorporated by reference herein, as may be applicable.

8. (1) *He never met with two of his three counsel prior to the start of trial. Therefore, he asserts, there was a lack of pretrial preparation.*

This Finding is duplicative of (10) of the Court's memorandum decision, located below at Finding No. 17. As a result, Finding No. 17 is incorporated herein by reference.

In addition, all counsel met with Petitioner prior to trial on a number of occasions. Counsel, having developed a division of labor, left primary contact responsibility with Wayne Gilbert. Meanwhile, Mike Stonefield and Joseph Butler proceeded to address legal matters and investigation. Each of these counsel were skilled, experienced, and conscientious in their representation of Petitioner. There is no evidence to support a lack of preparation. There is no evidence to support any reason to believe that counsel made any legal or tactical errors based upon the unfounded asserted lack of contact.

9. (2) *One of his counsel was depressed and engaged in theft during the course of time that he was representing Rhines.*

There is no evidence to support any belief that this counsel (Wayne Gilbert) failed, in any way, to fully and adequately represent Mr. Rhines. There is absolutely no evidence that would indicate that this situation in any way detracted from the legal services provided by this attorney. The problems of this attorney in no way manifested themselves in the trial of this case.

10. (3) *There was a failure to cross-examine some of the prosecution witnesses.*

This Finding is duplicative of (25) of the Court's memorandum decision, located below at Finding No. 28. As a result, Finding No. 28 is incorporated herein by reference.

In addition, a number of the State's witnesses were people who tied Rhines to the act. However, Rhines defense was not a "who-done-it." it was not disputed that Rhines committed the act. There is no evidence to support any indication that cross-examination of the State's witnesses who were not cross-examined at trial would have been, in any way, helpful to the defense. Choosing not to cross-examine these witnesses was a tactical decision founded upon no potential benefit. Trial counsel could not have done anything more with these witnesses that would have made any difference in this case. *See Sprik v. Class*, 1997 S.D. 134 ¶ 61, 572 N.W.2d 824, 835.

11. (4) *Failure of the lawyers to call witnesses who lived in Rapid City to provide mitigation evidence.*

This Finding is duplicative of (24) of the Court's memorandum decision, located below at Finding No. 27. As a result, Finding No. 27 is incorporated herein by reference.

In addition, the failure of counsel to call witnesses who lived in Rapid City to provide mitigation evidence was clearly a tactical decision by counsel. Counsel necessarily had to be very careful in presenting any mitigation as to Rhines' personal history. Doing so could open up the opportunity for the State to present evidence of Rhines' prior criminal record. There was no evidence to support the belief that there were any Rapid City witnesses available who would have been able to provide favorable mitigation evidence. There is no evidence to support the belief that, even if favorable mitigation evidence was available from Rapid City witnesses, that such evidence would not have opened up the opportunity for the State to present their own evidence of Rhines' prior criminal record.

12. (5) *His counsel, Joseph Butler, advised the jury, that he supported the death penalty.*

Mr. Butler's comment was made to the jury to develop an identification with them, to "get on common ground" with the jury and for sound tactical purposes. This strategy is especially significant where all jurors must be "Deaf [sic] Qualified" and therefore willing to consider applying the death penalty.

13. (6) *Defense counsel failed to raise, in the appeal of this case, the failure of the trial court to specifically answer a juror's question on prison life.*

During deliberations, the jury asked the following:

In order to award the proper punishment we need a clear prospective [sic] of what life in prison without parole really means. We know what the death penalty means, but we have no clue as to the reality of life without parole.

The questions we have are as follows:

1) Will Mr. Rhines *ever* be placed in a minimum security prison or be give [sic] work release.

2) Will Mr. Rhines be allowed to mix with the general inmate population.

3) Allowed to create a group of followers or admirers.

4) Will Mr [sic] Rhines be allowed to discuss, discribe [sic] or brag about his crime to other inmates, especially new or young men jailed for lesser crimes. (ex: drugs, DWI, assalt [sic] etc.)

5) Will Mr [sic] Rhines be allowed to marry or have conjugal visits.

6) Will he be allowed to attend college.

7) Will Mr [sic] Rhines have or attain any of the common joys of life (ex. TV, radio, music, telephone, or hobbies and other activities allowing him distraction from his punishment).

8) Will Mr [sic] Rhines be jailed alone or will he have a cellmate.

> 9) What sort of free time will Mr [sic] Rhines have. (What would his daily routine be.)
>
> We are sorry, your Honor, if any of these questions are inappropriate but there seems to be a huge gulf between our two alternitives [sic]. On one hand there is death, and on the other hand what is life in prison without parole.

Taken from trial transcript 2697-2701.

> The Court properly responded to the jury:
>
> Dear Jurors,
>
> I acknowledge your note asking questions about life imprisonment. All the information I can give you is set forth in the jury instructions.

Trial transcript at 2698.

Trial counsel did not request a detailed answer to this question. Trial transcript, 2697-2698. Rather, they asked that the Court use the explanation that it was using, but as a proviso that the jury could not engage in speculation or conjecture on the issue. The trial court determined that the speculation and conjecture language was not needed; the matter was raised on appeal in the context that the fact that the jury asked the questions showed that they were basing their verdict on Rhines' homosexuality. *Rhines*, 1996 S.D. 55, ¶¶ 101-107. The instructions as a whole set out the law the jury was to use in reaching its decision. The instructions were not in any sense deficient in setting out the law. No additional, detailed information about prison conditions was required to determine the issues in this case, and Defendant's future dangerousness was not explicitly at issue. Further, prison conditions are not an issue or consideration for the jury to concern itself

with, and elaborating on them would open up the possibility of error. There was no evidence available during the trial upon which the trial judge could have based an explanation of prison conditions, and further explanations would have been largely speculative.

In addition, the jury was told that a life sentence for Mr. Rhines would be life without the possibility of parole, and they were told so repeatedly.

Further, the area was addressed in the South Dakota Supreme Court Rhines *decision* as indicated above. There is no factual basis for relief based upon this issue.

> 14. (7) *The South Dakota Supreme Court was not presented with the case of Simmons v. South Carolina, 512 U.S. 154 (1994), which Rhines' search would have justified a reversal in the case.*

The United States Supreme Court in *Simmons v. South Carolina,* reversed a death sentence on the basis that the jury was not told that a "life sentence" would be without parole, where the Defendant's "future dangerousness" was a reason or basis for imposing the death penalty. Petitioner's counsel stated, at the habeas hearing herein, that he, Mr. Stonefield, was aware of *Simmons,* and what it had held, but he did not find it relevant to this case.

Factually, Mr. Stonefield's assessment appears to be correct. That Defendant may be dangerous in the future is not an aggravating factor or a criterion within South Dakota statutory scheme for imposing the death penalty. Even though there could be misunderstanding about the full significance of parole eligibility, the premise of *Simmons* is

inapplicable where future dangerousness is not a criterion for imposing the death penalty.

In addition, *Simmons* was after briefs were submitted, and before oral argument. The case was equally available to the South Dakota Supreme Court as it was to counsel.

Finally, life without parole was referred to a number of times in jury instructions and it was, therefore, defined.

15. (8) *The attorneys failed to effectively argue that death was a sentence which was disproportionate to the facts in this case compared to other similar situations.*

There is no showing that this issue was inadequately argued from a factual basis. In closing arguments, all three defense counsel argued before the jury that a sentence of death was disproportionate to the crime for which Defendant was found guilty. Petitioner's counsel submitted proportionality briefs on appeal and the South Dakota Supreme Court extensively considered the matter in direct appeal. This issue is therefore, res judicata and cannot be further considered on habeas. 1996 S.D. 55, ¶¶ 179-209.

16. (9) *The firm, to which Wayne Gilbert belonged at the time of the trial, hired a secretary who was the wife of the lead investigator of the case for the State.*

Mrs. Bahr is the wife of Pennington County Deputy Sheriff Don Bahr who was a lead investigator in Petitioner's case. Mrs. Bahr was hired by Gilbert's law firm shortly after the Petitioner's trial began. Gilbert was not immediately aware she had been hired and was not involved in the decision to hire her. Mrs. Bahr was hired as receptionist and had no access to any confidential

information concerning Petitioner's case. Gilbert was rarely in the office from the time she was hired until the completion of the trial. Petitioner presented no evidence to suggest any impropriety concerning her conduct.

17. (10) *There was a lack of communication and input available for him.*

This Finding is duplicative of (1) of the Court's Memorandum Opinion located above at Finding No. 8. As a result, Finding No. 8 is incorporated herein by reference.

In addition, Petitioner had numerous opportunities for input and complete discussion with counsel. Counsel met with Petitioner and discussed strategy and Petitioner was involved in the decision making process on various issues. When issues arose, a group discussion among Petitioner and his three counsel would occur and there was typically group consensus on how to proceed. Petitioner was involved in most all discussions involving his defense and Attorney Stonefield could think of no issue that was discussed without Petitioner's involvement and input. Petitioner has not identified any specific issues where counsel failed to communicate with him so that his defense was prejudiced.

Attorney Gilbert met most frequently with Petitioner. Gilbert did not believe communication was a problem between Butler, Stonefield, himself and Petitioner as they prepared for trial.

Petitioner presented no evidence of any communication problems during the course of the trial and prior to it.

Petitioner never offered an objection or discomfort with the quality of contact with counsel prior to or during trial.

18. (11) and (12) *The attorneys were unprepared for voir dire and trial and thus were ineffective.*

Two thousand sixty-seven (2,067) out of the two thousand seven hundred six (2,706) pages of trial transcript constitute *voir dire*. Counsel engaged in extensive questioning of jurors on an individual basis. The trial transcript sustains the expertise, effort and diligence of counsel. There is neither any evidence submitted, nor any suggestion in the record, to support the assertion that counsel were unprepared for *voir dire* or trial.

19. (13) *A Motion for Change of Venue should have been made.*

Counsel did consider the possibility of a Motion for Change of Venue, but they believed it was tactically not in the Defendant's best interest to do so. In addition, the course of *voir dire*, as it occurred, displayed clear evidence that the jury panel had not been tainted by pretrial, publicity. Indeed, this issue was reviewed by the Supreme Court. Therein, they stated, "Our review of *voir dire* shows an impartial jury was impaneled." *Rhines,* 1996 S.D. 55, ¶ 107, 548 N.W.2d at 442. It was counsel's opinion that pretrial publicity can best be examined through the individual *voir dire* they obtained. After reviewing a pretrial survey done in the community, they felt that a change of venue in this case would not benefit their client. Counsel was faced with the strong presumption under the law that a defendant can receive a fair trial in the community where the crime was committed. *State v Weatherford,* 416 N.W.2d 47, 50 (S.D. 1987). Beyond that, they reserved the option to raise this issue should the *voir dire* reveal a basis for such a request. The record of *voir dire* does not reveal any basis for this motion to be made. This was a sound tactical decision.

20. (14) and (15) *Defense should not have brought up the issue of Defendant's homosexuality during vior* [sic] *dire and they should have made a motion in limine to prevent reference to it.*

Counsel testified that the issue of homosexuality would inevitability come up through witnesses, and they believed that it could not be precluded. It was, therefore, their strategy to raise the matter on *voir dire*, to "deal with it head-on" and to sensitize the jury and gain an understanding of each juror's feelings on this issue. All three counsel believed this to be the best approach. It is not the province of the habeas court to second-guess the strategy of experienced trial counsel.

The fact of Rhines' homosexuality did, in fact, come up at trial. Viewed in light of the information available at the time, the determination was reasonable and not improper. All three trial counsel carefully considered this matter and determined that the approach taken was the best approach. Trial counsel so testified at the habeas hearing. This tactical decision was well within the province of counsel's judgment.

There could have been actual harm to Petitioner's case if the *voir dire* questions had not been asked, and if homosexuality came up, as counsel believed it inevitably would. This strategy decision was not unreasonable and not incompetent.

21. (16) *Objection should have been made to questioning of the medical examiner by the prosecutor suggesting the victim's hands were tied before he died.*

Defense counsel timely and successfully objected to testimony regarding chronological time frames for when the victim's hands were tied in the course of the attack. Defense counsel's objection was sustained because Dr. Habbe was unable to render an opinion based on a reasonable degree of medical certainty standard, and the jury was instructed to disregard any answers based on inference.

In addition, there was evidence from which a jury could draw conclusions concerning the sequence in which the rope was tied in relation to the death of the victim. *State v. Rhines*, 1996 S.D. 55, ¶ 163, 548 N.W.2d at 452.

Appropriate steps were taken by defense counsel to preclude any improper response by the medical examiner, and there is no reason to believe that the outcome of the case was in any way improperly influenced by the successfully challenged question posed by the prosecutor.

22. (17) and (18) *Counsel was ineffective by not objecting to the introduction of the Victim Impact Statement which was read by the mother of the victim.*

The mother of the victim read a Victim Impact Statement in Court, during the penalty phase of the trial. Counsel, for some time, was fully aware that the Impact Statement was going to be addressed and that there was a written statement which the mother may be anticipating reading. While the Court ruled on its admissibility immediately before its presentation, there was nothing more

counsel for the Defendant could do other than they had done. Nor was there any apparent basis to believe that what they could have forestalled its introduction. The request for a continuance would not have produced any further benefit for the Defendant.

23. (19) *Counsel should have made a motion to provide him with the opportunity to make an unsworn allocution to the jury at the penalty phase of trial.*

Even if Petitioner was legally entitled to a right of allocution, it was sound trial strategy for counsel not to seek such an opportunity for Petitioner. There was concern that a claim of remorse by Petitioner may open the door to evidence of Petitioner's criminal past being presented to the jury, which to that point had been successfully excluded from trial. Counsel did not believe Petitioner would appear remorseful before the jury and, therefore, any request for leniency from Petitioner may be more harmful than helpful. In addition, Petitioner did not want to make a statement before the jury. There were sound strategic reasons for Petitioner to forego an opportunity to speak to the jury. There are sound strategic reasons for an accused to forego an opportunity to speak to the jury.

Counsel's tactical decision to forego an opportunity for right of allocution was sound and nothing in this record justifies an attempt to second-guess counsel's and Petitioner's decision.

24. (20) *Defense counsel did not raise the argument, for the purpose of suppressing the Statement of the Defendant, that the police officer advised him prior to his statement no execution had occurred in South Dakota since 1947, as a means to entice a statement from him.*

The defense team discussed strategy for suppressing Rhines' confession and concluded that the strongest, and therefore best, argument for suppression was the inadequate *Miranda* warning. Counsel acknowledged that they thought about the statement by law enforcement but did not believe that it was the most viable argument for suppressing Rhines' confession. A strategic decision was made to argue for suppression based solely upon the inadequate *Miranda* warning.

In *State v. Rhines*, 1996 S.D. 55, ¶ 37, 548 N.W.2d 429 the South Dakota Supreme Court found that "Rhines' graphic statements reflect an individual who is aware of the potentially grave legal consequences of his confession." Rhines made a knowing and voluntary decision to relinquish his *Miranda* rights and, therefore, Petitioner's confession was properly admitted at trial.

Law enforcement's truthful comments about the implementation of the death penalty in South Dakota did not cause Petitioner's will to be overcome, thereby causing Petitioner to confess. Petitioner made some incriminating admissions prior to any comments from law enforcement about the history of executions in South Dakota. The statement by law enforcement, while undoubtedly intended to encourage the Defendant to cooperate with law enforcement, was accurate and not of such a nature to

overbear the will of the Defendant. *See State v. Smith*, 1998 S.D. 6, ¶ 8, 573 N.W.2d 515, 517.

25. (21) *An effort should have been made to solicit a plea agreement eliminating the death penalty should he implicate Sam Harter in this matter.*

In addition, Sam Harter was never even charged as a result of his role, if any, in this case. The state's attorney was clearly unwilling to compromise in his pursuit of the death penalty. There was no reason to believe that he would relent under any circumstances. Counsel, through deliberations and repeated discussions with the Petitioner and the state's attorney, were very convinced that there would be no plea agreement available in this case. Counsel could not have done anything more that would have made any difference in this case.

26. (22) and (23) *Not submitting jury instructions directing the jury to not consider the number of possible aggravating circumstances.*

Counsel did not submit jury instructions that would have stated that the number of aggravating circumstances could not be considered in determining whether to impose the death penalty. Petitioner argues that the State emphasized the number of aggravating circumstances, so he should have proposed such instructions. Petitioner's trial counsel Stonefield felt that the instructions should have been proposed. This Court finds, however, that the jury could consider all of the evidence and all of the circumstances that it had before it. There is nothing in the record to suggest that the process was tainted by a suggestion that the jury found more than one circumstance. There

were no significant arguments raised in closing by the State suggesting a stacking of circumstances in order to arrive at the death penalty. There was no error in failing to propose these instructions.

South Dakota law provides that for a jury to consider the death penalty; they must find at least one of a number of specific aggravating circumstances. Only after finding such a circumstance may they consider and possibly impose the death penalty. There is no weighing of particular circumstances under South Dakota law, the law requiring only that when a statutory aggravating circumstance is found, the jury may consider the death penalty.

The South Dakota Supreme Court already found that the instructions adequately set forth the nature and manner for the jury to consider, and this issue should, therefore, be factually subject to the doctrine of res judicata. The Supreme Court considered and found that the number of aggravating circumstances did make a difference in terms of the proportionality of the sentence. 1996 S.D. 55 at ¶ 207.

In the end, there simply is no evidence that the jury was somehow improperly influenced by the number of aggravating circumstances. The State did not suggest the same, the Petitioner did not suggest the same, and the matter quite simply never came up.

27. (24) *Failure to investigate Petitioner's background to provide effective mitigation.*

This Finding is duplicative of (4) of the Court's memorandum decision, located at Finding No. 11 above. As a result, Finding No. 11 is incorporated herein by reference.

In addition, one of the first efforts undertaken by counsel was to have Petitioner sketch out a biography of himself so that counsel could track mitigation leads. They searched for people from Petitioner's past, such as teachers or friends. They asked Petitioner directly for the names of teachers or friends whom they could interview.

Counsel also approached Petitioner's sisters and his brother. They attempted to recruit Petitioner's mother via the sisters. They called the sisters. Mother, however, was physically and emotionally incapable of testifying. Brother was simply unwilling.

Mike Stonefield went so far as to fly to Seattle, Washington, to locate a friend of Petitioner's. That effort to uncover mitigation evidence was unsuccessful as well.

Finally, counsel reviewed Petitioner's army records. As before, this search revealed nothing beneficial.

Mike Stonefield felt counsel could have attempted to paint a more complete picture of Petitioner's life at mitigation. However, that would only return them to the "big problem" in Stonefield's mind – that of opening up the opportunity for the State to present his criminal history.

There is no evidence to support the belief that there were any further mitigation witnesses available anywhere who would have been able to provide favorable mitigation evidence. There is no evidence to support the belief that, even if favorable mitigation evidence was available from some unknown witness, that such evidence would not have opened up the opportunity for the State to present evidence of Petitioner's prior criminal record. Counsel expended substantial and reasonable effort to investigate

mitigation evidence, and there is no evidence to support a belief that any further efforts would have been fruitful.

28. (25) *Heather Shepherd was not adequately cross-examined on inconsistencies in her testimony.*

This Finding is duplicative of (3) of the Court's memorandum decision located above at Finding No. 10. As a result, Finding No. 10 is incorporated herein by reference.

In addition, given the primary purpose of seeking to establish Petitioner's emotional state of mind to suggest a lesser offense than first degree murder, counsel's cross-examination was appropriate and reasonable. Any inconsistencies that existed did not relate to any issue of significance to the defense, as they would only address in a very limited way the commission of the crime. That was neither a matter of significant dispute, nor a material element of the defense. Any further cross-examination of Heather Shepherd's inconsistencies would have added nothing to the defense, and possibly detracted from it. Choosing to cross-examine Heather Shepherd in the manner that was employed was a tactical decision. Counsel could not have done anything more with cross-examination of Heather Shepherd that would have made any difference in this case. *See Sprik v. Class, supra.*

29. (26) *The assertion that counsel should have introduced evidence to prove that the victim was unfaithful to his fiancée to diminish the Victim Impact Statement presented in court.*

This would only serve to inflame the jury and serve no functional purpose. There is no evidence to support any indication that such evidence would, in any way, be helpful to Petitioner. Choosing to forego presenting this

evidence was a sound tactical decision founded upon no potential benefit, and possible harm. Presenting this evidence would not have made any difference in this case, other than perhaps expediting the same result.

30. (B) *Failure to suppress Mr. Rhines' statement.*

Miranda rights were provided appropriately to the Defendant. *State v. Rhines,* 1996 S.D. 55, ¶ 37, 548 N.W.2d at 429. This matter is res judicata.

31. (C) *Failure to keep Diane Staeffler on the jury.*

Ms. Staeffler could not set aside her attitudes toward the death penalty. Thus she was properly and reasonably excused. This matter is res judicata. *State v. Rhines,* 1996 S.D. 55 ¶ 51, 548 N.W.2d at 430-33.

32. (D) *State's selective use of peremptories.*

Peremptory challenges to potential jurors are discretionary for the State. The State did not use peremptory challenges in an inappropriate manner. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶ 55, 548 N.W.2d at 433-35.

33. (E) *Failure to respond to jury questions on "the reality of life without parole."*

Life without parole was mentioned a number of times in closing argument and jury instructions. Its meaning was reasonably clear under the circumstances of this case in the instructions. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶ 108, 548 N.W.2d at 442.

34. (F) *Capital punishment violates due process and equal protection.*

South Dakota capital punishment statutes have been upheld by the South Dakota Supreme Court. *State v. Moeller,* 1996 S.D. 60, ¶ 102, 548 N.W.2d at 487-89. This issue is res judicata.

35. (G) *Allowing a Victim Impact Statement denied due process.*

Impact statements have been provided for by law sometime prior to the murder in this case. SDCL 24-5A-43. *State v. Rhines,* 1996 S.D. 55, ¶ 132, 548 N.W.2d at 446-47. This issue is res judicata.

36. (H) *Insufficient evidence of torture.*

A jury finding of torture is supported by the evidence of the second non-fatal stab wound and the condition of the victim prior to the final blow. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶ 164, 548 N.W.2d at 452.

37. (I) *The trial court erred in instructing on depravity of mind.*

Failure to appropriately instruct on depravity of mind did not undermine the other findings of the jury regarding the basis for the death penalty. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶169, 548 N.W.2d at 453.

38. (J) *Error in aggravating circumstances which deny due process.*

This issue was discussed and rejected by the South Dakota Supreme Court and direct appeal throughout *State v. Rhines,* 1996 S.D. 55, ¶ 169, 548 N.W.2d at 415.

This issue is res judicata.

39. (K) *The jury's consideration of one or more invalid circumstances violated due process and equal protection.*

A jury can consider as many aggravating circumstances as it wants. It is required to find at least one statutory circumstance to exist in order to implement the death sentence. There is no violation of Petitioner's due process and equal protection rights. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 165-169, 548 N.W.2d at 450.

40. (L) *Allowing statements by Rhines concerning the judicial system.*

The admission of statements made by Petitioner during the course of his admissions that were critical of the judicial process did not violate Petitioner's rights. The trial court weighed the prejudice versus probative value of the statements and exercised its sound discretion in allowing the statements into evidence. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 92-94, 548 N.W.2d at 440-442.

41. (M) *Denied appointment of forensic communication experts.*

The appointment of experts is in the sound discretion of the trial court. The Court did not abuse its discretion in this matter. This matter is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 106-108, 548 N.W.2d at 442.

42. (N) *Refusal of Defendant's proposed instructions.*

The trial court has broad discretion in instructing the jury and the instructions should be considered as a whole. Instructions 8, 9, and 11 were not necessary. This issue is

res judicata. *Rhines,* 1996 S.D. 55, ¶ 111, 548 N.W.2d at 443, 444.

43. (O) *Jury was influenced by passion and prejudice and other factors.*

The evidence presented at trial is more than adequate to support the jury's verdict. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 180-185, 548 N.W.2d at 455.

44. (P) *Disproportionate sentence in this case compared to other homicides.*

The South Dakota Supreme Court went through a detailed comparison of other homicides and found this sentence to be entirely justified and proportionate. This issue is res judicata. *State v. Rhines,* 1996 S.D. 55, ¶¶ 185-209, 548 N.W.2d at 455-58.

45. (Q) *The use of State v. Moeller, 1996 S.D. 60, 548 N.W.2d 465 was not appropriate in the proportionately review.*

Petitioner's sentence was imposed by the jury. The fact that the South Dakota Supreme Court later reversed Moeller's sentence does not affect the efficacy of Petitioner's sentence itself. The jury decision on the death penalty was not seen to be defective. Thus, it was reasonable for the South Dakota Supreme Court to consider it.

46. (R) *Prejudicial misconduct of the State seeking a statement from the medical examiner that the victim's hands were tied before his death.*

This issue is res judicata; in addition, the contents of Findings No. 21 above are hereby incorporated by reference.

State v. Rhines [sic], 1996 S.D. 55, ¶ 163, 548 N.W.2d at 452.

47. (S) *Prosecutorial misconduct by not stating until the day of the penalty phase they would use the Victim Impact Statement.*

Defense counsel was aware for some time that the State may herein use this evidence. There was no prejudice therefrom. This issue is res judicata; in addition, the contents of Findings No. 22 above are hereby incorporated by reference herein.

48. (T) *Prosecutor referring to gutting the victim.*

This was not an unreasonable reference to the nature of the initial wound received by the victim. While the word may be graphic it is nonetheless reasonably relevant to the wound and therefore appropriate.

49. (U) *Enlarged photographs offered by the prosecution were inappropriate in showing the injuries sustained by the victim.*

The introduction of photographs is within the reasonable discretion of the trial court and it is not on its face misconduct by the prosecution. This contention is without merit based on all the evidence, and is unsupported by any evidence.

50. *Incompetence of counsel by not obtaining and submitting a letter to the State for the purposes of offering a plea agreement in which the Defendant would accept a life sentence.*

It is generally not appropriate to introduce plea negotiations to the jury in any phase of the jury process.

Had such a letter been prepared it is doubtful it would have been allowed to be introduced before the jury. It is further, very dubious that it would have any positive benefit for the Defendant. It is not a significant issue which could have changed the course of the jury's decision.

In addition, the contents of Findings No. 25 are incorporated herein.

51. Issues – B, C, D, E, F, G, H, I, J, K, L, M, N, O, and P were deiced [sic] by the South Dakota Supreme Court on direct appeal and are res judicata.

Based on the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. The above-entitled matter is properly venued before this Court.

2. This Court has personal jurisdiction over the parties.

3. This Court has subject matter jurisdiction over the above-entitled matter.

4. This Court based upon the foregoing, does have jurisdiction to issue a final and binding decision regarding Petitioner's Amended Application for Writ of Habeas Corpus.

5. Habeas corpus is a collateral attack on a final judgment and, therefore, this Court's scope of review is limited to questions of jurisdiction and basic constitutional rights. *Goodroad v. Solem*, 406 N.W.2d 141, 142-143 (S.D. 1994); *Jenner v. Leapley*, 521 N.W.2d 422, 425 (S.D. 1987).

6. Habeas corpus may only be used to review (1) whether the Court has jurisdiction of the crime and the person of the Defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated Defendant has been deprived of basic constitutional rights. *St. Cloud v. Leapley,* 521 N.W.2d 118, 129 (S.D. 1994). *Id.* (*Aliberti v. Solem*, 428 N.W.2d 638, 640 (S.D. 1988); *Satter v. Solem,* 422 N.W.2d 425, 427 (S.D. 1988); *Goodroad v. Solem*, 406 N.W.2d 141, 144 (S.D. 1987); *State ex rel. Burns v. Erickson*, 80 S.D. 639, 129 N.W.2d 712, 715 (1964).

7. The scope of this Court's review is also limited by the doctrine of res judicata, as this doctrine applies to habeas corpus proceedings. *St. Cloud v. Leapley*, 521 N.W.2d at 118; *Miller v. Leapley,* 472 N.W.2d 517, 519 (S.D. 1991); *Cowell v. Leapley,* 458 N.W.2d 514, 520 (S.D. 1990).

8. Habeas corpus is not a substitute for direct appeal *Goodroad v. Solem*, 406 N.W.2d 141 (S.D. 1987).

9. Res judicata bars the re-examination of those issues substantially raised in Petitioner's direct appeal. *St. Cloud, supra*; *Miller, supra*; *Cowell, supra.* It also bars the examination of issues raised upon direct appeal which are substantially raised in the habeas proceeding as an ineffective assistance of counsel claim. *Stumes v. Delo,* 508 N.W.2d 366, 370 (S.D. 1993).

10. South Dakota has adopted and applies the test for ineffective assistance of counsel claims set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

11. In a habeas corpus action where the claim is ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient. This requires showing that the counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the Defendant by the Sixth Amendment. Second, the Petitioner must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose results were reliable. *Olsen v. Lee,* 524 N.W.2d 616 (S.D. 1994); citing from *Iron Shell v. Leapley,* 503 N.W.2d 868, 870 (S.D. 1993); (quoting *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)). *See also Kimmelman v. Morrison,* 477 U.S. 365, 375 (1986) and *Luna v. Solem,* 411 N.W.2d 656, 658 (S.D. 1987).

12. It is not enough for the Petitioner to show that the verdict would have been different, he must show "that the counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable." *Lukken v. Class,* 561 N.W.2d 302, 308 (S.D. 1997).

13. There exists a strong presumption that counsel is competent, which presumption the Petitioner must overcome. *Michel v. State of Louisana* [sic], 350 U.S. 91, 101 (1955); *Luke v. Class*, 1996 S.D. 107, ¶ 14, 554 N.W.2d 189, 191, 192; Art. 92.

14. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances and the standard of review is highly deferential." *Phyle v. Leapley,* 491 N.W.2d 429, 433 (S.D. 1992).

15. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process so the trial cannot be relied on as having produced a just result." *Strickland v. Washington,* 466 U.S. at 686.

16. Trial tactics cannot be used as a basis for claimed error. *Boykin v. Leapley,* 471 N.W.2d 165 (S.D. 1991); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 80 L.Ed.2d 674 (1984).

17. Petitioner must overcome the presumption that under the circumstances, the challenged action might be considered sound trial strategy. *Phyle v. Leapley,* 491 N.W.2d 429, 433 (S.D. 1992).

18. The Petitioner must overcome the presumption of adequacy of counsel. *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

19. Trial tactics cannot be used as a basis for claimed error. *Boykin v. Leapley,* 471 N.W.2d 165, 169 (S.D. 1991); *Strickland,* 466 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984).

20. (1) *He never met with two of his three counsel prior to the start of the trial. Therefore, he asserts, there was a lack of pretrial preparation.*

This Conclusion is duplicative of (10) of the Court's memorandum decision, located below at Conclusion No. 28. As a result, Conclusion No. 28 is incorporated herein by reference.

In addition, counsel's decision to develop a division of labor and pursue respective responsibilities was a decision

grounded in trial strategy. Further individual contact with counsel would not have made any difference in this case. The division of labor, and counsel's individual contact with Petitioner, did not fall below an objective reasonableness standard. There is no reasonable probability that the result of the trial proceeding would have been any different had Petitioner had further contact with individual counsel.

21. (2) *One of his counsel was depressed and engaged in theft during the course of time that he was representing Rhines.*

Counsel was not ineffective with regard to this issue because there is not evidence to support his belief that this counsel failed, in any way to fully inadequately represent Mr. Rhines or to indicate that this situation in any way detracted form [sic] the legal services provided by this attorney. The problems of this attorney in no way manifested themselves in the trial of this case. Rhines has not alleged, or shown, deficient prejudice to his case.

The following statement: Counsel was not ineffective with regard to this issue because Rhines has not alleged, or shown, deficient performance or prejudice to his case.

22. (3) *There was a failure to cross-examine some of the prosecution witnesses.*

This Conclusion is duplicative of (25) of the Court's memorandum decision, located below in Conclusion No. 39. As a result, Conclusion No. 39 is incorporated herein by reference.

In addition, counsel's decisions not to cross-examine certain witnesses called by the State were decisions grounded in trial strategy. Counsel could not have done

anything more with these witnesses that would have made any difference in this case. These decisions did not fall below an objective reasonableness standard. There is no reasonable probability that the result of the trial proceeding would have been any different had counsel cross-examined these witnesses.

23. (4) *Failure of the lawyers to call witnesses who lived in Rapid City to provide mitigation evidence.*

This Conclusion is duplicative of (24) of the Court's memorandum decision, located below at Conclusion No. 38. As a result, Conclusion No. 38 is incorporated herein by reference.

In addition, the decision to call witnesses is a strategic decision. Failure to call a witness will not automatically produce ineffective assistance of counsel. Counsel's decision not to call Rapid City mitigation witnesses was a decision grounded in trial strategy. Thus, Petitioner must overcome a strong presumption that counsel's actions constituted reasonable trial strategy. *Snell v. Lockhart,* 14 F.3d 1289, 1301 (8th Cir. 1994). He has not.

Presentation of mitigation witnesses from Rapid City would not have made any difference in this case. Mitigation efforts and decisions did not fall below an objective reasonableness standard. There is no reasonable probability that the result of the trial proceeding would have been any different had counsel presented mitigation witnesses from Rapid City.

24. (5) *His counsel, Joseph Butler, advised the jury that he supported the death penalty.*

Counsel was not ineffective with regard to this issue because plausible trial strategy does not rise to ineffective assistance of counsel. *Loop v. Class*, 1996 S.D. 107, ¶ 18, 554 N.W.2d at 192.

25. (6) *Defense counsel failed to raise, in the appeal of this case, the failure of the trial court to specifically answer a juror's question on prison life.*

Counsel was not ineffective with regard to this issue because the instructions as a whole set out the law the jury was to use in reaching their decision. In prison conditions are not an issue for the jury to concern themselves with and to attempt to elaborate on them would open the possibility of error.

26. (7) *The South Dakota Supreme Court was not presented with the case of Simmons v. South Carolina, 512 U.S. 154, (1994), which Rhines asserts would have justified a reversal of this case.*

Defense counsel was not ineffective with regard to this issue because life without parole was referred to in the jury instructions a number of times and there was no issue raised as to Petitioner's future dangerousness under South Dakota law. Therefore, counsel was not deficient for failing to present the case of *Simmons v. South Carolina*. Nor has Defendant shown any prejudice by this case not being presented to the South Dakota Supreme Court.

27. (8) *The firm, to which Wayne Gilbert belonged at the time of trial, hired a secretary who was the wife of the lead investigator of the case for the State.*

Counsel was not ineffective with regard to this issue because Mrs. Bahr was hired without Mr. Gilbert's awareness. She had no access to any confidential information concerning the case, and served as a receptionist without access to any confidential information. There was no evidence submitted to suggest any improprieties concerning her conduct. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

28. (10) *There was a lack of communication and input available for him.*

Counsel was not ineffective with regard to this issue because there were numerous opportunities for input and complaint discussion available with counsel. There is no evidence with any communication problems whatsoever during the course of the trial or prior to it. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

29. (11) and (12) *The attorneys were unprepared for voir dire and trial and thus were ineffective.*

The record does not support these allegations, thus there can be no showing of prejudice. Counsel was not deficient. Mere conclusory statements are insufficient to sustain an ineffective assistance of counsel claim. Petitioner has failed to overcome the strong presumption that counsel rendered adequate assistance. There is no reasonable probability that the result of *voir dire* or trial would

have been any different had counsel prepared themselves differently.

30. (13) *A Motion for Change of Venue should have been made.*

Counsel was not ineffective with regard to this issue because plausible trial strategy does not rise to ineffective assistance of counsel. *Sprik v. Class,* 1997 S.D. 134, ¶¶ 24-25, 572 N.W.2d 824, 829-830.

31. (14) and (15) *Defense counsel should not have brought up the issue of Defendant's homosexuality during voir dire and that they should have made a motion in limine to prevent reference to it.*

Counsel was not ineffective with regard to this issue because the issue of Defendant's homosexuality would inevitability come up through witnesses and the best approach was to deal with it head on, in order to sensitize the jury and get a better understanding as to the jurors feelings. This decision was a tactical decision well within the parameters of counsel's judgment. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

32. (16) *Objection should have been made to questioning of medical examiner by prosecutor suggesting that victim's hands.*

Counsel was not ineffective with regard to this issue because there was evidence from which a jury could draw conclusions concerning the sequence in which the rope was tied in relationship to the death of the victim and an appropriate objection was made by defense counsel thereby precluding any improper response by the medical

examiner. Rhines has not alleged or shown, deficient performance or prejudice to his case.

33. (17) and (18) *Counsel was ineffective by not objecting to the introduction of the Victim Impact Statement which was read by the mother of the victim.*

Counsel was not ineffective with regard to this issue because defense counsel was fully aware that the impact statement was going to be addressed and that there was a written statement which the mother may be anticipating reading. Counsel could have done nothing more than they did. There was not any basis to believe that they could have forestalled the introduction of this testimony. In addition the request for continuance would not have produced any further benefit for the Defendant. Petitioner has alleged, or shown, deficient performance or prejudice to his case.

Counsel was not ineffective with regard to this issue because Rhines has not alleged, or shown deficient performance or prejudice to his case. *State v. Rhines,* 1996 S. D. 55, ¶ 130.

34. (19) *Counsel should have made a motion to ride in with the opportunity to make a unsworn allocution to the jury at the penalty phase of trial.*

Counsel was not ineffective with regard to this issue because even though there may be some marginal support for legal argument that such an allocution could be made, counsel chose not to propose it for three very sound strategic reasons. First there was concern that the allocution may not ring with sufficient remorse and that it would not work to Defendant's benefit. There was a possibility that the Defendant in his allocution could open up the door to

allowing in evidence of his prior criminal history. Third, Petitioner did not choose to make a statement before the jury. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

> 35. (20) *Defense counsel did not raise the argument for the purposes of suppressing the statements of the Defendant, that the police officer advised him prior to his statement, no executions had occurred in South Dakota since 1947, as a means to entice a statement from him.*

Counsel was not ineffective with regard to this issue because counsel believed there was a stronger argument for suppression in the alleged *Miranda* warning violation. In addition, there is nothing in the record that suggests that this statement in any fashion weighed on the decision by the Defendant to make his admissions and confession. Finally, the statement was accurate and not of such a nature to overbear the will of the Defendant. *See State v. Smith*, 1998 S.D. 6, ¶ 8, 573 N.W.2d 515, 517.

> 36. (21) *An effort should have been made to solicit a plea agreement eliminating the death penalty should he implicate Sam Harter in this matter.*

The two-part *Strickland v. Washington* test for evaluating claims of ineffective assistance of counsel also applies to guilty pleas. *Hill v. Lockhart*, 474 U.S. 52, 100 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Failure to negotiate a plea, though, is not ineffective without a showing that the prosecution was willing to enter into plea negotiations. A futile effort at a plea agreement is not necessary. *See Thompson v. Wainwright*, 784 F.2d 1103, 1107 (11th Cir. 1986). Counsel's effort to secure a plea bargain agreement was not deficient. Given the state's Attorney's posture,

those efforts did not fall below an objective reasonableness standard. Without any showing that the state's attorney was willing to enter into plea negotiations with counsel, all that Petitioner urges is speculation. Such speculation fails to establish a reasonable probability that the outcome would have been different. Accordingly, Petitioner has not and cannot establish prejudice. *United States v. Boon*, 62 F.3d 323, 327 (10th Cir. 1995).

> 37. (22) and (23) *Not submitting the jury instructions directing the jury to not consider the number of possible aggravating circumstances.*

Counsel was not ineffective with regard to this issue because the instructions adequately set forth in nature manner which the jury is to reach a decision concerning the death penalty. Rhines has not alleged, or shown, deficient performance or prejudice to his case.

> 38. (24) *Failure to investigate Defendant's background to provide effective mitigation.*

This Conclusion is duplicative of (4) of the Court's memorandum decision located above at Conclusion No. 23. As a result, Conclusion No. 23 is incorporated herein by reference.

In addition, strategic choices made after a less than complete investigation are reasonable precisely to the extent that a reasonable professional judgment support the limitations on investigations. *Strickland v. Washington*, 466 U.S. at 690-691. Counsel's decision not to mount the all out mitigation investigation advanced by Petitioner was supported by reasonable professional judgment. *See Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 3125-26, 97 L.Ed.2d 638 (1987). Petitioner has not demonstrated that the mitigation investigation of counsel fell

outside the wide range of professionally competent assistance. *See Strickland v. Washington*, 466 U.S. at 690, 104 S.Ct. at 2066. Counsel exercised the skill and diligence that reasonably competent counsel would exercise under similar circumstances. There is no reasonable probability that the result of this proceeding would have been any different had counsel mounted a more extensive mitigation investigation. *See Darden v. Wainwright*, 477 U.S. 168, 184-186, 106 S.Ct. 2464, 2473-74, 91 L.Ed.2d 144 (1986), *Strickland v. Washington*, 466 U.S. at 694, 404 S.Ct. at 2068. Counsel made a significant effort, based on reasonable investigation and logical argument, to mitigate Petitioner's punishment. *See Stewart v. Gramley*, 74 F.3d 132, 135 (7th Cir. 1996).

Petitioner, through Michael Butler, offers the "American Bar Association Guidelines For The Appointment And Performance Of Counsel In Death Penalty Cases" as a backdrop against which to measure counsel's representation in this matter. However,

> Prevailing norms of practice as reflected in American Bar Association standards . . . are guides to determine what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's

> cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to insure that criminal defendants receive a fair trial. [Citations omitted.]

Strickland v. Washington, 466 U.S. at 688-689.

Not withstanding [sic] the ABA guidelines offered by Petitioner, counsel's decisions regarding what manner in which to go about investigating mitigation evidence were decisions grounded in trial strategy based upon what was available to them. There is no evidence offered, nor any indication in the record, that any additional mitigation investigation would have made any difference in this case. Counsel's mitigation investigation did not fall below an objective reasonableness standard. There is no reasonable probability that the result in this case would have been any different had counsel pursued a more extensive mitigation investigation.

> 39. (25) *Heather Shepherd was not adequately cross-examined on inconsistencies in her testimony.*

This Conclusion is duplicative of (3) in the Court's memorandum decision, located above at Conclusion No. 22. As a result, Conclusion No. 22 is incorporated herein by reference.

In addition, counsel's decision to cross-examine Heather Shepherd in the manner which was employed was a decision grounded in trial strategy. Further cross-examination would not have made any difference in this case. Said cross-examination did not fall below an objective

reasonableness standard. There is no reasonable probability that the result of the trial proceeding would have been any different had counsel further cross-examined Heather Shepherd.

40. (26) *The assertion that counsel should have introduced evidence to prove that the victim was unfaithful to his fiancée to diminish the Victim Impact Statement presented in Court.*

Counsel's decision to forego this evidence was a decision grounded in trial strategy and common sense. Presenting such evidence would have not made any difference in this case, other than negative. Abstaining from such inflammatory evidence did not fall below an objective reasonableness standard. There is no reasonable probability that the result of the sentencing proceeding would have been any different had this evidence been presented.

41. *Trial counsel was incompetent by not obtaining and submitting a letter to the State for purposes of offering a plea agreement in which the Defendant would accept a life sentence.*

This Finding is duplicative of (21) of the Court's memorandum decision, located at Finding No. 36 above. As a result, Finding No. 36 is incorporated herein by reference.

In addition, it is very doubtful such a letter containing plea negotiations would have been allowed to be introduced before the jury. Indeed, Petitioner was unable to cite any rule of evidence supporting such a notion. To the contrary, there was a standing written order that counsel were *not* to refer to plea negotiations.

Moreover, it is very dubious that such a letter would have had any positive benefit for Petitioner. As the Supreme Court has previously noted, Petitioner's confessions presented "compelling evidence of the Defendant's moral copeability [sic] and apparent lack of sincere remorse." *Rhines,* 1996 S.D. 55, ¶ 209, 548 N.W.2d at 458.

It is, as a general rule, not appropriate to introduce plea negotiations to the jury at any phase of the jury process. Counsel's attempt to do so would have been futile, and would have made no difference in this case. Counsel's failure to do so did not fall below an objective reasonableness standard. Such a letter could not, under any stretch of the imagination, be considered a significant issue which could have changed the course of the jury's decision. There is no reasonable probability whatsoever that the result of the trial proceeding would have been any different had Petitioner offered such a letter as mitigation evidence.

42. (B) *Failure to suppress Mr. Rhines' statement.*

The trial court did not err in failing to suppress the Petitioner's statement. Consideration of this matter is barred by the doctrine of res judicata.

43. (C) *Failure to keep Diane Staeffler on the jury.*

The trial court did not err in excusing perspective juror Diane Staeffler for cause. In addition, consideration of this issue is precluded by the doctrine of res judicata.

44. (D) *State's selective use of peremptories.*

The trial court did not err in allowing the State to use peremptory challenges as it did. In addition, this point is barred by the doctrine of res judicata.

45. (E) *Failure to respond to jury questions on "the reality of life without parole."*

The trial court did not err in failing to respond to jury questions about the reality of life without parole. In addition, consideration of this issue is barred by res judicata.

46. (F) *Capital punishment violates due process and equal protection.*

South Dakota capital punishment statutes do not violate due process and equal protection. In addition, further consideration of this issue is barred by the doctrine of res judicata.

47. (G) *Allowing a Victim Impact Statement denied due process.*

Petitioner was not denied due process when the trial court allowed the reading of a victim impact statement by the victim's mother. In addition, further consideration of this issue is barred by the doctrine of res judicata.

48. (H) *Insufficient evidence of torture.*

There is not insufficient evidence of torture in order to uphold an aggravating circumstance during the penalty phase. In addition, further consideration of this issue is barred by the doctrine of res judicata.

49. (I) *The trial court erred in instructing on depravity of mind.*

While the South Dakota Supreme Court found that the trial court did fail to appropriately instruct on the issue of "depravity of mind," the Court also found that such failure did not undermine the other findings of the jury on the basis for the death penalty. This conclusion by

the South Dakota Supreme Court was correct, and, in addition, further consideration of this issue is barred by the doctrine of res judicata.

50. (J) *Error in aggravating circumstances which deny due process.*

There was no error in definition by the Court, or finding by the jury, regarding the aggravating circumstances found by the jury, except the trial court's failure to appropriately instruct on depravity of mind. Such failings as there were do not undermine the other findings of the jury, and there was no other error in aggravating circumstances which would otherwise deny due process. In addition, further consideration of this issue is barred by the doctrine of res judicata.

51. (K) *The jury's consideration of one or more invalid circumstances violated due process and equal protection.*

The jury's consideration of the invalid aggravating circumstance of "depravity of mind" did not violate either due process or equal protection; all other consideration of aggravating circumstances was proper and appropriate, as found by the South Dakota Supreme Court on direct appeal. In addition, further consideration of this issue is barred by the doctrine of res judicata.

52. (L) *Allowing statements by Rhines concerning the judicial system.*

The trial court properly admitted Petitioner's statements critical of the judicial system, as found by the South Dakota Supreme Court on direct appeal. In addition, further consideration of this matter is barred by the doctrine of res judicata.

53. (M) *Denied appointment of forensic communication experts.*

Denial of appointment of forensic communication expert, by the trial court, was not an abuse of discretion, did not violate due process, and was otherwise not erroneous. In addition, further consideration of this matter is barred by the doctrine of res judicata.

54. (N) *Refusal of Defendant's proposed instructions.*

Refusal of the Petitioner's proposed Instruction Nos. 8, 9, and 11 was not erroneous, and did not amount to a violation of due process or any other constitutional right. In addition, further consideration of this matter is barred by the doctrine of res judicata.

55. (O) *Jury was influenced by passion and prejudice and other factors.*

The jury was not unduly influenced in rendering its verdict, the verdict was not a product of passion and prejudice, and the evidence presented at trial is more than adequate to support the jury's verdict. In addition, further consideration of this matter is barred by the doctrine of res judicata.

56. (P) *Disproportionate sentence in this case compared to other homocides* [sic].

Petitioner's sentence was not disproportionate in this case, as compared to other homicides, and the South Dakota Supreme Court found that his sentence was entirely justified and proportionate. Further consideration of this matter is also barred by the doctrine of res judicata.

57. (Q) *The use of State v. Moeller was not appropriate in the proportionality review.*

There was no violation of due process, nor any other constitutional right, when the South Dakota Supreme Court considered the case of *State v. Moeller* in determining proportionality of this Defendant's sentence. Further, since the Court has considered such case, further consideration of this matter is barred by the doctrine of res judicata.

58. [R] *Prejudicial misconduct of the State seeking a statement from the medical examiner that the victim's hands were tied before his death.*

There was no prejudicial misconduct of the State of South Dakota in seeking a statement from the medical examiner that the victim's hands were tied before his death. In addition, further consideration of this matter is barred by the doctrine of res judicata.

59. (S) *Prosecutorial misconduct by not stating until the day of the penalty phase they would use the Victim Impact Statement.*

There was no prosecutorial misconduct in the State's introduction of a victim impact statement, since defense counsel were aware for some time that the State was about to use such evidence. In addition, further consideration of this matter is barred by the doctrine of res judicata.

60. (T) *Prosecutor referring to getting the victim.*

There was no prejudicial prosecution misconduct, nor any violation of any of Petitioner's constitutional rights, when the State referred to "gutting the victim."

61. (U) *Enlarged photographs offered by the prosecution were inappropriate in showing the injuries sustained by the victim.*

There was no violation of Defendant's rights under the United States or South Dakota Constitutions when the State offered enlarged photographs. The contention is unsupported by evidence or cogent and appropriate argument, and is, as a matter of law, without merit.

62. There was no incompetence of counsel, no deficient performance, and no prejudice to the Petitioner for counsel's failure to "obtain and submit a letter to the State for purposes of offering a plea agreement in which the defendant would accept a life sentence." Counsel repeatedly attempted to get such a plea bargain; the State refused; and the trial court, in all likelihood, would not have admitted such a letter at the time of the penalty phase herein.

63. ISSUES B, C, D, E, F, G, H, I, J, M, N, O, and P, are barred from consideration herein by the doctrine of *res judicata*.

64. If any Finding of Fact is improperly designated as such, it is hereby incorporated by reference in the Conclusions of Law. If any Conclusion of Law is improperly designated as such, [it] is hereby incorporated by reference as a Finding of Fact.

Dated this 16 day of November, 1998.

/s/ [Illegible] _____
The Honorable Merton B. Tice
Circuit Court Judge

ATTEST:

James Truman
/s/ C. Nelson, deputy
Clerk of Courts

(SEAL)
j-pld5.gg

608 N.W.2d 303

Supreme Court of South Dakota.

Charles Russell RHINES, Petitioner and Appellant,
v.
Douglas WEBER, Warden, South Dakota State Penitentiary, Appellee.

No. 20816.

Argued Sept. 16, 1999.
Decided Feb. 9, 2000.

Mark Barnett, Attorney General, Craig M. Eichstadt, Deputy Attorney General, Grant Gormley, Gary Campbell and Sherri Sundem Wald, Assistant Attorneys General, Pierre, for appellee.

JAMES W. ANDERSON, Circuit Judge.

Charles Russell Rhines (Rhines) appeals from a circuit court judgment denying his application for a writ of habeas corpus. We affirm.

FACTS AND PROCEDURE

A full review of the facts can be found in this Court's previous opinion affirming Rhines' conviction and sentence. *State v. Rhines,* 1996 SD 55, 548 N.W.2d 415, *cert. denied, Rhines v. South Dakota,* 519 U.S. 1013, 117 S.Ct. 522, 136 L.Ed.2d 410 (1996). Only those facts relevant to Rhines' present appeal of the denial of habeas corpus will be reiterated in this opinion.

From late 1991 until he was terminated in February 1992, Rhines worked at the Dig 'Em Donut Shop on West Main Street in Rapid City, South Dakota. On March 8,

1992, the body of Donnivan Schaeffer, an employee of Dig 'Em Donuts, was found in the back storeroom of the donut shop. Schaeffer's hands had been bound, and he had been stabbed in the abdomen, upper back, and the back of the neck. Approximately $3,300 in cash, coins, and checks was missing from the store.

On July 27, 1992, Rhines was indicted by a Pennington County grand jury in connection with the burglary at Dig Em' Donuts and the murder of Schaeffer. Trial commenced on January 4, 1993, with Rhines being represented by Wayne Gilbert, Joseph Butler, and Michael Stonefield. On January 22, 1993, the jury found Rhines guilty of premeditated first-degree murder and third-degree burglary.

On January 26, 1993, the same jury sentenced Rhines to death by lethal injection for the first-degree murder conviction, having found four aggravating circumstances in connection with Schaeffer's death: (1) the offense was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest under SDCL 23A-27A-1(9); (2) the offense was committed for the purpose of receiving money under SDCL 23A-27A-1(3); (3) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture under SDCL 23A-27A-1(6); and (4) the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of the mind under SDCL 23A-27A-1(6).

Thereafter, Rhines' trial counsel were appointed to represent him on appeal of his conviction and sentence to this Court. In that appeal, we ruled that the sentencing jury's discretion was not adequately channeled by the "depravity of the mind" aggravating circumstance, as

limited by the trial court's instruction. *Rhines,* 1996 SD 55, ¶ 148, 548 N.W.2d at 449. However, we held that "the invalidity of the 'depravity of the mind' circumstance d[id] not so taint the penalty proceedings as to mandate reversal of Rhines' death sentence." *Id.* at ¶ 169, 548 N.W.2d at 453. Accordingly, this Court affirmed Rhines' conviction and death sentence.

Subsequently, Rhines filed an application for writ of habeas corpus. The Honorable Merton Tice Jr. denied the application and quashed the writ in a written opinion dated October 8, 1998. Additional facts will be recited herein as they relate to specific issues.

STANDARD OF REVIEW

The remedy of a writ of habeas corpus "is in the nature of a collateral attack on a final judgment, therefore, our scope of review is limited." *Black v. Class,* 1997 SD 22, ¶ 4, 560 N.W.2d 544, 546.

> Habeas corpus can be used only to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases, whether an incarcerated defendant has been deprived of basic constitutional rights. For purposes of habeas corpus, constitutional violations in a criminal case deprive the trial court of jurisdiction.

Siers v. Class, 1998 SD 77, ¶ 9, 581 N.W.2d 491, 494 (quoting *Black,* 1997 SD 22, ¶ 4, 560 N.W.2d at 546). Moreover, "[h]abeas corpus is available only where the defendant is imprisoned or restrained of his liberty." *Loop*

v. Class, 1996 SD 107, ¶ 11, 554 N.W.2d 189, 191 (quoting *Two Eagle v. Leapley*, 522 N.W.2d 765, 768 (S.D.1994)).

We have also stated:

> Habeas corpus is not a substitute for direct review . . . The habeas petitioner has the initial burden to prove by a preponderance of the evidence that he is entitled to relief. The habeas court's factual findings are given 'considerable deference' and we will not reverse these findings unless they are clearly erroneous.

Siers, 1998 SD 77, ¶¶ 9-10, 581 N.W.2d at 494 (citations omitted).

In regard to ineffective assistance of counsel claims, the following standard applies:

> Whether a defendant has received ineffective assistance of counsel is essentially a mixed question of law and fact. In the absence of a clearly erroneous determination by the circuit court, we must defer to its findings on such primary facts regarding what defense counsel did or did not do in preparation for trial and in . . . presentation of the defense at trial. This court, however, may substitute its own judgment for that of the circuit court as to whether defense counsel's actions or inactions constituted ineffective assistance of counsel.

Loop, 1996 SD 107, ¶ 11, 554 N.W.2d at 191 (quoting *Aliberti v. Solem,* 428 N.W.2d 638, 640 (S.D.1988)).

ANALYSIS AND DECISION
ISSUE ONE

Whether the circuit court erred in denying Rhines' application for writ of habeas corpus based on claims of ineffective assistance of counsel.

The Sixth Amendment "right to counsel is the right to the *effective* assistance of counsel." *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674, 692 (1984) (emphasis added). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Id.,* 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93.

This Court applies a two-prong test to ineffective assistance of counsel claims. In order to meet the burden of proof for a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that such deficiency prejudiced the defendant. *Siers,* 1998 SD 77, ¶ 12, 581 N.W.2d at 495; *Sprik v. Class,* 1997 SD 134, ¶ 22, 572 N.W.2d 824, 829; *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

In regard to the first prong of this test, an objective standard of reasonableness, counsel's errors must be "so serious that [he or she] was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment." *Garritsen v. Leapley,* 541 N.W.2d 89, 93 (S.D.1995) (quoting *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693))). As a result, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. A defendant asking this Court to invoke such scrutiny carries a heavy burden:

> Because of the difficulties inherent in making the evaluation, a court must indulge a *strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance;* that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered *sound trial strategy.*

Loop, 1996 SD 107, ¶ 14, 554 N.W.2d at 192 (emphasis added) (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95). Moreover, "every effort [must] be made to eliminate the distorting effects of hindsight." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." *Phyle v. Leapley,* 491 N.W.2d 429, 433 (S.D.1992) (quoting *Kimmelman v. Morrison,* 477 U.S. 365, 381, 106 S.Ct. 2574, 2586, 91 L.Ed.2d 305, 323 (1986)), *overruled on other grounds by Hopfinger v. Leapley,* 511 N.W.2d 845, 847 (S.D.1994).

In regard to the second prong of the test, prejudice to the defendant, this Court must focus on whether the result of the proceeding was fundamentally unfair or unreliable, not merely on whether the outcome would have been different. *Siers,* 1998 SD 77, ¶ 12, 581 N.W.2d at 495; *Sprik,* 1997 SD 134, ¶ 22, 572 N.W.2d at 829; *Loop,* 1996 SD 107, ¶ 15, 554 N.W.2d at 192; *Hopfinger,* 511 N.W.2d at 847. The law does not entitle the defendant to have his conviction set aside "solely because the outcome would have been different but for the counsel's error." *Lockhart*

v. Fretwell, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180, 189 (1993). Rather, "counsel's errors [must be] so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

With these principles in mind, we now examine Rhines' claims of ineffective assistance of counsel during his trial and original appeal. [1]

> A. Whether counsel were ineffective because they did not attempt to suppress Rhines' confession on grounds that it was induced by a false promise and thereby coerced and involuntary.

Rhines was arrested in King County, Washington, at approximately 12:45 p.m. on June 19, 1992, for a burglary that occurred in that state. After being read a *Miranda* warning, Rhines asked something to the effect of, "[t]hose two detectives from South Dakota are here, aren't they?" Rhines was asked no further questions by the King County authorities.

Detective Steve Allender of the Rapid City Police Department and Pennington County Deputy Sheriff Don Bahr arrived at 6:56 p.m. the same day to interrogate Rhines about the burglary and murder at Dig 'Em Donuts. Detective Allender testified that he advised Rhines of his *Miranda* rights before questioning began. During this questioning, Rhines confessed to burglarizing Dig 'Em Donuts and murdering Schaeffer. At some point in the interrogation Rhines also stated, "I don't deserve anything

[1] We have previously recognized that the same ineffective assistance rules apply to both trial counsel and appellate counsel. *Lykken v. Class,* 1997 SD 29, ¶ 27, 561 N.W.2d 302, 309.

but a kick in the teeth and the electric chair." In response, Detective Allender observed that South Dakota had not executed anyone in fifty years.

In Rhines' trial and original appeal, his appointed counsel unsuccessfully argued for suppression of Rhines' confession based on an inadequate *Miranda* warning and insufficient waiver of *Miranda* rights.[2] At the habeas corpus hearing, Michael Stonefield, one of Rhines' appointed counsel, testified that Rhines' confession was very damaging in both the guilt and penalty phases of the trial, and the attorneys never discussed ways to suppress the confession beyond the *Miranda* challenge. Stonefield also testified that he now believes the confession could have been challenged on grounds that Detective Allender made some type of implied promise to Rhines that he would not get the death penalty. Additionally, Wayne Gilbert, another of Rhines' appointed counsel, testified that he had some concern about Detective Allender's statements in that they may have suggested to Rhines that the chance of the death penalty was remote.[3]

On this habeas appeal, Rhines argues that his statement could have been attacked as involuntary, having been coerced by a false promise by Allender that Rhines would not receive the death penalty. He claims that had counsel made this argument at the suppression hearing, his confession could have been thrown out. *See State v.*

[2] *See Rhines,* 1996 SD 55, ¶¶ 5-37, 548 N.W.2d at 424-29.

[3] Gilbert, unlike Stonefield, testified that trial counsel did talk about suppressing the confession on these grounds, but Gilbert did not know how fully the discussion was developed into a legal argument.

Smith, 1998 SD 6, ¶ 7, 573 N.W.2d 515, 517 (involuntary confessions inherently unreliable).

However, in applying the two-prong analysis above, it becomes clear that counsels' failure to make this "coercion" argument was not ineffective assistance. First, there is no indication that counsel's representation fell below an objective standard of reasonableness as required by the first prong of the test. *Siers,* 1998 SD 77, ¶ 12, 581 N.W.2d at 495. The test for ineffective assistance is not whether counsel could dream up new trial strategies with the benefit of hindsight. It is whether counsel pursued a sound strategy at the time of the alleged error. *Sprik,* 1997 SD 134, ¶ 23, 572 N.W.2d at 829. At the time counsel were developing strategy for suppressing the statement, it was *entirely reasonable* for them not to pursue a coercion argument based on an alleged false promise by Allender.

The reasons for this conclusion are threefold. One, Allender's comment that South Dakota had not executed anyone in fifty years was a true statement and could not be construed as a *false promise* that Rhines would not get the death penalty. Two, there is nothing in the record from Rhines himself indicating that Allender's statement alone induced him to confess. In fact, the only real evidence of this supposed coercion is counsels' supposition at the habeas hearing.

Three, a number of factors indicate Rhines' confession was voluntary. Although Allender's statement might have induced Rhines to cooperate, "[t]he question is not whether the . . . statements were the cause of the confession but whether those statements were so manipulative or coercive that they deprived [the defendant] of his ability to make an unrestrained, autonomous decision to confess."

Smith, 1998 SD 6, ¶ 8, 573 N.W.2d at 517. Rhines made incriminating statements prior to Allender ever mentioning South Dakota's recent history with the death penalty.[4]

Additionally, in response to Allender's comment on the lack of recent executions, Rhines predicted, "There is a first time for everything." Moreover, as we recognized in Rhines' previous appeal, his statements throughout the interview reflected "an individual who [was] aware of the potentially grave legal consequences of his confession." *Rhines,* 1996 SD 55, ¶ 37, 548 N.W.2d at 429. Therefore, Rhines' contention that counsel should have pursued a coercion argument at the suppression hearing is not supported by the evidence, and he has failed to prove that counsel did not pursue a sound trial strategy under the first prong of the ineffective assistance test.

Second, in addition to not meeting the first prong of the ineffective assistance test discussed above, Rhines has not shown, under the second prong of the test, that he was prejudiced by the decision to attack the confession solely on *Miranda* grounds. *Siers,* 1998 SD 77, ¶ 12, 581 N.W.2d at 495. Rhines' brief and oral argument are replete with indications that his trial counsel would have pursued the coercion theory if they could do everything over again. What is utterly lacking, however, is any evidence that their decision to solely pursue a *Miranda* argument

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[4] Rhines had indicated that he was standing in the donut shop with money in his hand when he heard the door to the shop open, and at that point had nowhere to run. He had also asked, "You can't plead guilty to first-degree murder, can you?" to which Allender had responded, "I don't know."

prejudiced Rhines, that is, deprived him a fair trial.[5] As a result, Rhines has failed to satisfy either prong of the test for ineffective assistance of counsel in regard to his confession, and hence, we affirm the circuit court's decision on this issue.

> B. Whether counsel were ineffective because they did not appeal the trial court's refusal to answer the jury's questions on prison life under *Simmons v. South Carolina.*

After finding Rhines guilty of first-degree murder, the jury had to choose between the death penalty and life imprisonment without parole. During deliberations, the jury sent the court a note with specific questions about life imprisonment without parole, including:

> Will Mr. Rhines be allowed to mix with the general inmate population?
>
> Will Mr. Rhines be allowed to discuss, describe or brag about his crime to other inmates, especially new and/or young men jailed for lesser crimes? (ex: drugs, DWI, assault, etc.)
>
> Will Mr. Rhines be allowed to marry or have conjugal visits?
>
> Will Mr. Rhines be allowed to have or attain any of the common joys of life (ex. TV, radio, music, telephone, or hobbies and other activities to distract him from his punishment)?

[5] Indeed, Rhines' appellate counsel admitted in oral argument that no prejudice could be shown from trial counsels' decision to pursue only the *Miranda* argument.

> Will Mr. Rhines be jailed alone or will he have a cell mate?
>
> What sort of free time will Mr. Rhines have (what would his daily routine be)?

The court responded, "All the information I can give you is set forth in the jury instructions." The court denied defense counsels' request that the court add, "[Y]ou may not base your decision on speculation or guess work."

After the jury returned a sentence of death for first-degree murder, Rhines' trial counsel filed an appeal with this Court. In that appeal, counsel did not raise the trial judge's refusal to answer the jury's specific questions about prison life. Additionally, at oral argument, counsel did not cite *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994).[6]

In *Simmons,* the sentencing jury was given a choice between imposing the death penalty or "life in prison," and the trial court refused to instruct the jury that "life in prison" did not include the possibility of parole. Additionally, the prosecution argued that the defendant's future dangerousness could be considered by the jury in fixing a suitable punishment and that a death sentence would "be an act of self-defense." *Id.* at 157, 114 S.Ct. at 2191, 129 L.Ed.2d at 139. In addition, when the jury sent the court a note asking whether a life sentence carried a possibility of parole, the trial judge instructed them that they were not to consider parole eligibility and that life imprisonment

[6] Even though *Simmons* was not decided until after briefs were submitted in Rhines' original appeal, this Court's rules allow a party to present late authorities not available at the time of brief-writing, provided certain procedures are followed. SDCL 15-26A-73.

was to be understood in its "plain and ordinary" meaning. *Id.* at 160, 114 S.Ct. at 2192, 129 L.Ed.2d at 140.

On appeal, the Supreme Court overturned the conviction on due process grounds. The Court held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Id.* at 156, 114 S.Ct. at 2190, 129 L.Ed.2d at 138.

Having put in place this background of the *Simmons* case and the jury's questions regarding prison life at Rhines' sentencing, we now turn to Rhines' ineffective assistance of counsel claim. Rhines argues the trial court should have specifically answered the jury's questions about the "reality of life without parole," and that its refusal to do so was a violation of due process under *Simmons.* Accordingly, he asserts that counsels' failure to make this argument at oral argument on his original appeal was ineffective assistance.

However, a closer analysis reveals that counsels' failure to cite *Simmons* at oral argument in the original appeal did not violate an objective standard of reasonableness or prejudice Rhines, as is required by the test for ineffective assistance. *Simmons* is clearly distinguishable from the case at hand.

The Court in *Simmons* made it clear that its decision was based on (1) the state putting the defendant's future dangerousness at issue, and (2) the failure of the trial court to tell the jury that "life in prison" meant life without parole. *Id.* at 161-62, 114 S.Ct. at 2193, 129 L.Ed.2d at 141. Neither of these factors were present at Rhines' sentencing.

First, the State never told the jury that future dangerousness was a factor for them to consider in sentencing. Rhines indicates that the prosecutor made such argument indirectly. For example, the prosecutor told the jury to consider such things as "the death of an innocent witness," and "the greedy killing of . . . [Schaeffer]" when evaluating aggravating circumstances. In addition, he suggested that Rhines knew how to kill with a knife, and that many people in the jury did not know how to kill with a knife. Finally, Rhines contends that the "depravity of the mind" circumstance itself[7] suggested that Rhines would be dangerous in the future.

However, the prosecutor's comments in this case do not rise to the level of argument in *Simmons,* in which the prosecutor expressly told the jury that imposing the death penalty would "be an act of self-defense." *Id.* at 157, 114 S.Ct. at 2191, 129 L.Ed.2d at 139. In addition, the facts of *Simmons* do not support the idea that the "depravity of the mind" circumstance, in and of itself, translates into a statement that Rhines' future dangerousness makes him deserving of the death penalty.

Second, even if future dangerousness was somehow made an issue, the jury in Rhines' case was repeatedly told that life imprisonment meant life without parole, which is exactly what is required by *Simmons.* That case did not require the trial court to speculate as to every possible situation which Rhines could encounter while spending

[7] This aggravating circumstance provides that "[t]he offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the victim." SDCL 23A-27A-1(6).

the rest of his life in jail.[8] Not only would this require a grotesque extension of *Simmons,* it would force a trial judge to speculate on day-to-day correctional decisions which are entirely within the discretion of the Department of Corrections. Indeed, had the trial judge attempted to answer the jury's questions in this case, he could have said little more than, "It depends," which would have generated even more unanswerable questions from the jury. It is impossible to believe that such a situation was envisioned by the Supreme Court in *Simmons.*

Because the State did not put future dangerousness at issue at Rhines' sentencing, and even if it did, the jury was clearly told that life imprisonment did not include a possibility of parole, *Simmons* is clearly distinguishable. As a result, Rhines cannot prove that his counsel violated an objective standard of reasonableness by failing to cite *Simmons* in his original appeal or that this tactical decision prejudiced Rhines with a fundamentally unfair result in that appeal. The circuit court was correct in rejecting this issue.

> C. Whether counsel were ineffective because they failed to ask for specific instructions that aggravating circumstances must be considered individually.

---

[8] Rhines relies heavily on isolated language from Justice Souter's concurrence in *Simmons* for the proposition that the trial court should have answered specific questions on prison life: "[W]henever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following refusal of such a request should be vacated." *Id.* at 172-73, 114 S.Ct. at 2198, 129 L.Ed.2d at 148 (Souter J, concurring). However, an entire reading of the concurrence indicates that Justice Souter is addressing the sentencing term "life imprisonment," not suggesting that a trial court must specifically define "life without parole."

During the sentencing phase of the trial, the prosecutor began his argument by asking the jury to go to the death penalty verdict form when they began deliberations and to determine whether or not one of the aggravating circumstances had been proven to exist beyond a reasonable doubt. He then proceeded to discuss individual aggravating circumstances. In part of this discussion, he stated:

> Consider this aggravating circumstance, the death of an innocent witness. And when you consider that circumstance, and you consider it just in and of itself; because only one must be proven, based on that circumstance and that circumstance alone, I ask you to return a verdict imposing the sentence of death . . . But there is more . . . *there is not just one aggravating circumstance in this case, not just one upon which the law justifies the death sentence.* (emphasis added).

He later pointed out:

> And on that circumstance alone, that greedy killing of this young man, I would ask you to impose the death penalty . . . without even considering his relationship to the first one. But literally what I have talked to you about right now is why, why was Donnivan Schaeffer killed and sometimes in our daily lives we talk about the how and why, and I am going into the how now. *For there is another aggravating circumstance for you to consider, and that's the first one on the sheet.* (emphasis added).

Rhines claims that the prosecutor's argument violated South Dakota's capital sentencing scheme. In this state, the jury must find one aggravating circumstance beyond a reasonable doubt to impose the death penalty, but they are

always free to choose life imprisonment. SDCL 23A-27A-4 and 23A-27A-5. Because of the prosecutor's statements, argues Rhines, the jury chose death solely because of the sheer number of aggravating circumstances. He attaches special importance to this argument because the jury was not instructed on how to decide between life imprisonment and death once they found one aggravating circumstance existed beyond a reasonable doubt.[9] Rhines argues that counsel should have objected to the prosecutor's argument and proposed instructions that the number of aggravating circumstances had no impact on what sentence the jury should impose.

Once again, these arguments fail to meet the test for ineffective assistance of counsel. First, if indeed the jury was given no guidance on how to make a decision between life imprisonment and death after they found at least one aggravating circumstance,[10] this is clearly permissible under the precedents of this Court and the United States Supreme Court. *Rhines,* 1996 SD 55, ¶¶ 79-82, 548 N.W.2d at 437-38; *Tuilaepa v. California*, 512 U.S. 967, 978-79, 114 S.Ct. 2630, 2638-39, 129 L.Ed.2d 750, 764 (1994); *Zant v. Stephens,* 462 U.S. 862, 875, 103 S.Ct. 2733, 2741-42, 77 L.Ed.2d 235, 248-49 (1983). Therefore, this supposed lack of guidance lends no support to Rhines' ineffective assistance argument.

[9] South Dakota law permits the sentencer to consider all mitigating circumstances, but imposes no standard of proof on mitigation. SDCL 23A-27A-1 and 23A-27A-2.

[10] The jury was told that they could consider all mitigating factors and impose a life sentence even without a reason, which implies that they were given some guidance. However, because the law is clear on this point, we need not dwell on this issue.

Second, the prosecutor did not encourage the jury to give the number of aggravating circumstances special weight in arriving at a death sentence. The prosecutor began his argument by telling the jury that each individual aggravating circumstance was "so serious and so offensive by just one of those, the law tells you, you are justified in imposing the death penalty, just one." Moreover, it is clear that he argued each aggravating factor separately. The portions of his argument which mention more than one aggravating circumstance are clearly just matters of transition between the different aggravating circumstances. Indeed, the jury would have had difficulty following the argument if he had not used such segues.

Third, even if one could interpret the prosecutor's argument as inviting the jury to stack aggravating circumstances, the trial court's instructions adequately guided their deliberations. For example, the jury was instructed that they were not required to impose a death sentence, and they could impose a life sentence for any reason satisfactory to them, or for no reason. In addition, they were informed that *"[e]ach alleged aggravating circumstance,* and the evidence applicable thereto, should be considered separately ... *the existence of any one aggravating circumstance should not control or influence your decision with respect to another alleged aggravating circumstance."* (emphasis added). Finally, they were told, "If you find *one or more* aggravating circumstances to exist, then you may return one of two verdicts as to the penalty in this case," and they were given a choice between life imprisonment without parole or a death sentence. (emphasis added).

Therefore, even if the prosecutor's argument could be interpreted as encouraging the jury to give special weight

to the sheer number of aggravating factors, the court's instructions adequately guided their deliberations. The fact that the jury found more than one aggravating circumstance did not undermine their verdict.

Thus, there is no support for Rhines' argument that the jury imposed a death sentence because of the sheer number of aggravating circumstances. Likewise, he has failed to prove that counsels' failure to object to the prosecutor's argument during sentencing or propose specific instructions either violated an objective standard of reasonableness or prejudiced him with a trial that was fundamentally unfair. The circuit court was correct in denying his ineffective assistance claim on this issue.

Remaining ineffective assistance claims

Rhines raises several other issues relating to ineffective assistance of counsel in his brief. However, these remaining instances are either conclusions, which are wholly unsupported by the record, or sound trial strategy when judged by the circumstances facing trial counsel at the time of their decisions. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95. Therefore, this Court will address the remaining ineffective assistance claims no further than to point out that Rhines has not proven either prong of the ineffective assistance test in regard to these claims. The circuit court's denial of these ineffective assistance issues is affirmed.

ISSUES TWO AND THREE

Whether this Court was required to conduct detailed harmless error analysis under the Eighth Amendment to the United States Constitution regarding the trial court's

instructional error defining depravity of the mind, and whether this error was not harmless if the jury found Rhines more worthy of the death penalty because of the number of aggravating circumstances based on the State's argument at the penalty phase.

In support of its death penalty verdict, the jury cited four separate aggravating circumstances in connection with Schaeffer's death. *Rhines,* 1996 SD 55, ¶ 166, 548 N.W.2d at 452. One of these four circumstances was that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of the mind. *Id.*

In Rhines' original appeal of his conviction and sentence, this Court ruled that the jury's discretion was not adequately channeled by the depravity of the mind aggravating circumstance, as limited by the trial court's instruction. *Id.* at ¶¶ 137-148, 548 N.W.2d at 447-49. As a result, we held that the depravity of the mind circumstance, as defined by the trial court, was overbroad and vague and hence constitutionally invalid under the Eighth and Fourteenth Amendments. *Id.* at ¶ 166, 548 N.W.2d at 452.

However, because the jury found four aggravating circumstances, only one of which was invalid, we analyzed what effect, if any, the invalid "depravity of the mind" circumstance had on Rhines' death sentence. Most of this analysis involved a thorough examination of *Zant,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235. In that case, the Supreme Court held that the invalidity of one aggravating circumstance did not require reversal of a death sentence if certain procedural safeguards were present in a state's capital punishment law. We determined that South Dakota's capital sentencing scheme, which is modeled after the Georgia death penalty statutes at issue in *Zant,*

included all the procedural safeguards emphasized in that case. *Rhines,* 1996 SD 55, ¶ 169, 548 N.W.2d at 453. As a result, we ultimately ruled that "the invalidity of the 'depravity of the mind' circumstance d[id] not so taint the penalty proceedings as to mandate reversal of Rhines' death sentence." *Id.*

With that background in mind, we turn to two interrelated issues raised by Rhines. First, he claims that this Court erred in not conducting a detailed harmless error analysis in his original appeal after we determined that the "depravity of the mind" circumstance, as limited by the trial court's instruction, was unconstitutional.[11] Second, he claims that the instructional error was not harmless because after the prosecutor's argument in the penalty phase of the trial, the jury imposed the death penalty based on the sheer number of aggravating circumstances. To state this argument another way, Rhines claims that if the jury imposed the death sentence solely because there were four aggravating circumstances, and one of the four aggravating circumstances was unconstitutional, then his sentence must be reversed.

We first address Rhines' argument that this Court was required to, and did not, undertake a specific harmless error analysis in his original appeal. He contends that this Court was required to give a detailed explanation of what the sentencing jury would have done absent the invalid "depravity of the mind" circumstance.

[11] This harmless error issue was seemingly raised in Rhines' original appeal. *Rhines,* 1996 SD 55, ¶ 167, 548 N.W.2d at 453. However, this Court did not directly address the issue in its previous opinion, so we will dispose of the issue here. *Id.* at ¶¶ 168-169, 548 N.W.2d at 453.

Rhines proceeds down two different avenues to arrive at this contention. First, he argues that South Dakota should be considered one of the "weighing" jurisdictions whose capital sentencing schemes require the sentencer to weigh aggravating and mitigating circumstances before arriving at a death sentence. In those weighing capital punishment jurisdictions, before it can uphold a death sentence imposed by a sentencer who considered an invalid aggravating circumstance, the appellate court must undertake either a re-weighing of aggravation and mitigation evidence, or a detailed explanation, based on the record, of why the invalid circumstance did not contribute to the sentence obtained. *Sochor v. Florida,* 504 U.S. 527, 532, 112 S.Ct. 2114, 2118, 119 L.Ed.2d 326, 336-37 (1992); *Clemons v. Mississippi,* 494 U.S. 738, 741, 110 S.Ct. 1441, 1444, 108 L.Ed.2d 725, 733 (1990).

However, this argument is without merit. This Court has clearly held that South Dakota law does not require the weighing of aggravating circumstances against mitigating factors. Although the jury is free to consider all mitigating circumstances, they need only find one statutory aggravating factor beyond a reasonable doubt to impose the death penalty. *Rhines,* 1996 SD 55, ¶¶ 78-82, 169, 548 N.W.2d at 437-38, 453. As pointed out above, our analysis in Rhines' original appeal satisfied the requirements of *Zant,* which is all that is required in a non-weighing capital punishment state such as South Dakota. *Id.* at ¶¶ 168-69, 548 N.W.2d at 453.

Second, Rhines opines that a detailed harmless error analysis is required even if South Dakota is a non-weighing state. In support of this proposition, he cites *Stringer v. Black,* 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). In that opinion the Supreme Court stated:

With respect to the function of a state reviewing court in determining whether the sentence can be upheld despite the use of an improper aggravating factor, the difference between a weighing State and a nonweighing State is not one of 'semantics,' . . . but of critical importance. *In a nonweighing State,* so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings. *But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.*

When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

503 U.S. at 231-32, 112 S.Ct. at 1137, 117 L.Ed.2d at 379 (emphasis added) (citation omitted).

Contrary to Rhines' interpretation, a review of the above-quoted language reveals that a detailed harmless error analysis is not required in a non-weighing state such as South Dakota. After a thorough analysis of South Dakota's capital sentencing scheme according to the factors in *Zant,* we concluded that the "invalidity of the 'depravity of the mind' circumstance d[id] not so taint the

penalty proceedings as to mandate reversal of Rhines' death sentence." *Rhines,* 1996 SD 55, ¶ 169, 548 N.W.2d at 453. After the detailed analysis of *Zant,* it was inherent in our conclusion that the "invalid factor would not have made a difference to the jury's determination." *Stringer,* 503 U.S. at 232, 112 S.Ct. at 1137, 117 L.Ed.2d at 379. Therefore, this Court committed no error in its analysis of the effect of the jury's consideration of the invalid "depravity of the mind" aggravating circumstance in Rhines' original appeal.

As for his next issue, Rhines argues that his conviction cannot survive harmless error analysis because the prosecutor at his trial suggested that the number of aggravating circumstance carried special weight in the jury's sentencing deliberations. As a result, Rhines contends, the invalidity of one of these aggravating circumstances requires reversal of Rhines' sentence.

Rhines' argument here has the same basis as his ineffective assistance of counsel claim discussed above under Issue 1(C). He claims that the prosecutor's argument to the jury in the sentencing phase of his trial urged them to stack aggravating circumstances to arrive at a death sentence. Essentially, Rhines contends that the prosecutor turned his jury into a "weighing" jury.

This Court has already rejected the merits of this argument under Issue 1(C). We find that the prosecutor's mention of multiple aggravating factors was merely a matter of transition in his argument, and even if this were not the case, the court's instructions sufficiently guided the jury's sentencing deliberations. As a result, even if this Court were required to undertake a harmless error analysis as

urged by Rhines, his argument on this issue would have no bearing on the Court's decision.

ISSUES FOUR THROUGH SIXTEEN

All remaining issues in Rhines' brief (Issues 4-16) were fully and fairly considered by this Court in his direct appeal. *Rhines,* 1996 SD 55, 548 N.W.2d 415. Therefore, we are bound by the "settled law in South Dakota that issues, which were raised in a direct appeal, are res judicata on a writ of habeas corpus." *Sprik,* 1997 SD 134, ¶ 20, 572 N.W.2d at 828. *See also Loop,* 1996 SD 107, ¶ 24, 554 N.W.2d at 193; *Lodermeier v. Class,* 1996 SD 134, ¶ 24, 555 N.W.2d 618, 626; *Scott v. Class,* 532 N.W.2d 399, 402 (S.D.1995); *St. Cloud v. Leapley,* 521 N.W.2d 118, 129 (S.D.1994). Consequently, these issues are barred by the doctrine of res judicata and will not be considered by this Court in this habeas review.

CONCLUSION

Rhines has failed to meet his burden of proof under our two-prong test for ineffective assistance of counsel. Additionally, this Court did not err by not undertaking a reweighing of aggravating and mitigating factors or a detailed harmless error analysis in Rhines' original appeal because such analysis is not required in a nonweighing jurisdiction such as South Dakota. We also reject Rhines' contention that under such analysis, his conviction must be reversed because the prosecutor's argument at the sentencing phase of his trial encouraged the jury to stack aggravating circumstances.

Affirmed.

MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

JAMES W. ANDERSON, Circuit Judge, for KONENKAMP, Justice, disqualified.

(3)

No. 03-9046

Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

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CAPITAL CASE

QUESTION PRESENTED

Can a federal court stay, or must it dismiss, a 28 U.S.C. § 2254 Petition for Habeas Corpus that includes exhausted and unexhausted claims when the stay is necessary to permit the Petitioner to exhaust claims in state court without having his federal petition barred by the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act?

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The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Rhines v. Weber*, 346 F.3d 799, *rehearing en banc denied*, 2003 U.S. App. LEXIS 23865, docket no. 02-2990 (8th Cir. 2003), and is reproduced in the Joint Appendix ("J.A."). J.A. 145-148. The memorandum decision of the United States District Court for the District of South Dakota is not published, but is in the Joint Appendix. J.A. 127-136.

The affirmance of the capital murder conviction of Petitioner is published at *State v. Rhines*, 548 N.W.2d 415 (S.D. 1996), *cert. denied*, 519 U.S. 1013 (1996), and is in the Joint Appendix. J.A. 149-245. The reported decision reflecting denial of Petitioner's first state habeas corpus petition is *Rhines v. Weber*, 608 N.W.2d 303 (S.D. 2000), and is in the Joint Appendix. J.A. 292-317.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Eighth Circuit reversed the district court's grant of a stay of Petitioner's timely-filed habeas corpus petition through an opinion and judgment entered on October 7, 2003. *Rhines v. Weber*, 346 F.3d 799 (8th Cir. 2003); J.A. 145-146. The United States Court of Appeals for the Eighth Circuit denied the petition for rehearing en banc on November 24, 2003. J.A. 148. Petitioner filed his petition for writ of certiorari on February 19, 2004, which was granted on June 28, 2004. *Rhines v. Weber*, 124 S.Ct. 2905 (2004).

For this case, 28 U.S.C. § 1254(1) provides the jurisdiction of the Supreme Court of the United States.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, Section 9 of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Section 2254 of Title 28 of the United States Code provides in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –
>
> (A) the applicant exhausted the remedies available in the courts of the State . . .

Section 2244 of Title 28 of the United States Code provides in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review

> or the expiration of the time for seeking such review;
>
> . . .
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Petitioner Charles Russell Rhines ("Rhines") was convicted in state court in South Dakota of third degree burglary and first degree murder. J.A. 16-19. Rhines was sentenced to death by lethal injection. J.A. 17.

Rhines appealed to the Supreme Court of South Dakota, raising a number of challenges to his conviction and sentence. Despite finding that the aggravating circumstance of "depravity of mind" in the South Dakota death penalty statute was unconstitutional because it did not adequately channel the sentencing jury's discretion, the Supreme Court of South Dakota upheld Rhines' conviction and death sentence. *State v. Rhines*, 548 N.W.2d 415, 448-49 (S.D. 1996), *cert. denied*, 519 U.S. 1013. This Court denied Rhines' initial petition for certiorari on December 2, 1996. *Rhines v. South Dakota*, 519 U.S. 1013 (1996).

On December 5, 1996,[1] Rhines filed his first state habeas corpus petition. J.A. 32. Only two days had elapsed between the denial of Rhines' petition for writ of certiorari and the filing of his first state court habeas corpus petition. J.A. 32-33; *see Rhines v. South Dakota*, 519 U.S. 1013 (1996). The state trial court denied relief, and the Supreme Court of South Dakota affirmed the denial of habeas corpus relief to Rhines on February 9, 2000. *Rhines v. Weber*, 608 N.W.2d 303 (S.D. 2000); J.A. 292.

Rhines signed his *pro se* federal habeas corpus petition on February 17, 2000, which was eight days after the Supreme Court of South Dakota affirmed denial of his state court habeas corpus petition. J.A. 3-19. That petition was filed in the United States District Court for the District of South Dakota on February 22, 2000. J.A. 3.

On May 15, 2000, acting *pro se*, Rhines filed a "Motion to Toll Time" out of concern for the one-year statute of limitations contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). J.A. 25-29.[2] Respondent, through the South Dakota Attorney General's Office, countered Rhines' Motion to Toll Time by advising the district court:

> [I]n addition to two days from December of 1996, Petitioner also had a period of either six days or twelve days in February 2000 that ran against the statute of limitations. Petitioner has had a maximum of fourteen days (more likely eight days) that have run against the statute of limitations in Section 2244.
>
> Since Petitioner is in no danger of losing his right to file for federal habeas corpus relief, there is no reason to toll the time of the statute of limitations.

J.A. 33. Respondent then requested "that Petitioner's Motion to Toll Time be denied because it is unnecessary, only eight (or fourteen) days having run on the Section 2244 one-year statute of limitations." J.A. 33. The district court then denied Rhines' *pro se* Motion to Toll Time as "unnecessary." J.A. 35.

Consistent with the order of the district court, Rhines, through his court appointed counsel, filed his Amended Petition for Writ of Habeas Corpus and Statement of Exhaustion, which raised thirteen general grounds, with subparts totaling 35 claims, asserting constitutional defects in his conviction and sentence. J.A. 39-60. Respondent challenged twelve of those claims as unexhausted. J.A. 72-79.

On July 3, 2002, more than sixteen months after Rhines had filed his federal habeas corpus petition, the district court determined that eight of the 35 claims in the petition had not been exhausted. J.A. 128-133. At Rhines' request, and relying both upon the concurrences by Justice Souter and Justice Stevens in *Duncan v. Walker*, 533 U.S. 167 (2001) and upon the developing court of appeals authority, the district court held the petition in abeyance to allow Rhines to present the unexhausted claims to state court without jeopardy of a time bar to his federal petition

[1] The Antiterrorism and Effective Death Penalty Act of 1996 became effective on April 24, 1996.

[2] Rhines miscalculated the time left in his AEDPA one-year limitation period in his *pro se* Motion to Toll Time. J.A. 25. The South Dakota Attorney General's Office properly calculated that only eight to fourteen days, based on whether the "mailbox rule" applies, had run on Rhines' one year AEDPA period when he filed his federal habeas corpus petition. J.A. 33.

under AEDPA. J.A. 134-136. The district court issued the stay "conditioned upon Petitioner commencing state court exhaustion proceedings within sixty days of this order and returning to this court within sixty days of completing such exhaustion." J.A. 136. Rhines complied with the district court's order by starting his second state court habeas corpus case on August 22, 2003, within sixty days of the July 3, 2002, order.[3] J.A. 139-144.

Respondent appealed to the United States Court of Appeals for the Eighth Circuit raising, among other issues, the propriety of the district court's stay of Rhines' mixed habeas corpus petition. J.A. 137-138. The United States Court of Appeals for the Eighth Circuit, relying on its decision in *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003), vacated the district court's grant of a stay. *Rhines v. Weber*, 346 F.3d 799, *rehearing en banc denied*, 2003 U.S. App. LEXIS 23865, docket no. 02-2990 (8th Cir. 2003); J.A. 145-148. The Eighth Circuit remanded the case to the district court to determine whether Rhines could proceed on exhausted claims by deleting unexhausted claims from his petition. *Id.*; J.A. 146. This Court thereafter granted Rhines' Petition for Writ of Certiorari. *Rhines v. Weber*, 124 S.Ct. 2905 (2004).

SUMMARY OF ARGUMENT

A stay of the unexhausted claims of a mixed § 2254 habeas corpus petition is an appropriate way to address the situation where the one year AEDPA statute of limitations runs before the district court determines a federal petition to be mixed. A stay under such circumstances reconciles the total exhaustion requirement of *Rose v. Lundy*, 455 U.S. 509 (1982), with the statutory and constitutional right of a § 2254 petitioner to have federal court review of exhausted claims.

[3] Rhines' second state habeas petition is dated August 3, 2002, and was sent for filing and service on August 22, 2003. J.A. 142-144.

District courts have inherent authority to issue stays in proceedings before them. Nothing in the AEDPA prohibits a court from staying the exhausted claims of a mixed petition to allow a habeas petitioner to present unexhausted claims to state court. A stay of exhausted claims to permit state court resolution of unexhausted claims serves the underlying purposes of *Rose* of ensuring to state courts the first opportunity to review all claims of constitutional error in state court convictions and requiring total exhaustion in a manner that "does not unreasonably impair the prisoner's right to relief." *Id.* at 522.

Although this case is the first occasion where the issue has been squarely presented to this Court, several justices of this Court have recognized the propriety of a stay of a timely filed petition when the AEDPA statute of limitations runs while the case is pending in federal court. *Duncan v. Walker*, 533 U.S. 167, 182 (2001) (Souter, J., concurring) ("nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies"); *id.* at 182 (Stevens, J., concurring) ("in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies"); *Pliler v. Ford*, 124 S.Ct. 2441, 2448-49 (2004), (Ginsburg, J., dissenting); *id.* at p. 2450 (Breyer, J., dissenting) ("the other conditions that I raised in *Duncan* support the lawfulness of the Ninth Circuit's stay-and-abeyance procedure"); *see*

also id. at 2448 (O'Connor, J., concurring). With the exception of the United States Court of Appeals for the Eighth Circuit from which this appeal stems, all other circuit courts of appeals that have considered the issue approve of a stay of a timely-filed mixed petition under similar circumstances.

Literal application of the *Rose* mandate to dismiss Rhines' petition would contravene the reasoning of *Rose* and recent holdings of this Court protecting the rights of prisoners who file mixed petitions to return to federal court after presenting their claims to state court. *See Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998). Unwavering adherence to the rule of dismissal of a mixed petition without allowing a court the option of a stay would create a "trap for the unwary" prisoner and would result in the illogical bar of Rhines' federal habeas rights as untimely, where he allowed only one or two weeks to run on his AEDPA one-year limitation before coming to federal court. According to Department of Justice statistics, approximately 93% of petitions are filed pro se, approximately 57% of petitions are dismissed as containing unexhausted claims, and district courts took an average of nine months to dismiss claims on procedural grounds. As a practical matter, blind adherence to dismissal of mixed petitions without regard to the AEDPA one-year statute of limitations is untenable.

Permitting courts the discretion to stay the exhausted claims in a mixed petition is the best way to reconcile *Rose*, *Duncan*, the AEDPA, and principles in the Court's recent decisions of *Slack* and *Stewart*. As the district court did here, the stay can be conditioned on a petitioner's conscientious pursuit in state court of unexhausted claims and can be refused when the petitioner is abusing the

writ. Delay tactics may be blunted through a number of means, and very few habeas corpus petitioners have an incentive to delay their request for relief from perceived constitutional defects in their convictions or sentences.

ARGUMENT

I. Introduction.

Three years ago, in *Duncan v. Walker*, 533 U.S. 167 (2001), this Court held that a federal petition for a writ of habeas corpus does not constitute an "application for State post-conviction or other collateral review" under 28 U.S.C. § 2244(d)(2), capable of tolling the one year limitations period prescribed by 28 U.S.C. § 2244(d)(1). As a result, the limitations period continues to run even after the filing of a timely § 2254 federal habeas petition, and through the time a district court takes to determine whether the claims in the petition satisfy the pre-AEDPA "total exhaustion" rule of *Rose v. Lundy*, 455 U.S. 509 (1982). When the district court's determination of the petition's exhaustion status occurs after the limitations period has run, a "without prejudice" dismissal of a "mixed" petition under *Rose* results in the immediate and permanent termination of the petitioner's ability ever to secure federal review of his constitutional claims in a habeas corpus proceeding.

Recognizing the potential for unfairness occasioned by a *Rose* dismissal after the *Duncan* decision, many lower federal courts have sought a workable method of enforcing the total exhaustion rule without destroying a petitioner's ability to seek federal habeas corpus review once full exhaustion has been achieved. With the exception of the

United States Court of Appeals for the Eighth Circuit, every court of appeals that has resolved this issue has determined that staying a federal petition while state court proceedings are completed is an acceptable and effective means of fulfilling the mandate of *Rose* without unfair and unwarranted prejudice to the prisoner's right to have a federal court review the merits of his habeas claims. The question posed by this case is whether those courts are correct in finding flexibility in *Rose*'s rule sufficient to accommodate the changes wrought by the AEDPA and *Duncan*, or whether a petitioner like Rhines – who arrived in federal court with approximately 350 days remaining on his one-year limitations period – must suffer preclusive consequences never envisioned by *Rose* when a district court determines that his petition is mixed.

II. The District Court was correct to stay Rhines' petition pending exhaustion of his previously unexhausted claims.

A. A stay is the method by which a federal court with jurisdiction should make way for state court proceedings.

Acting consistently with the constitutional protection of habeas corpus, Congress has granted federal jurisdiction over claims of deprivation of constitutional rights arising out of state court convictions and sentences. 28 U.S.C. § 2254(a); U.S. CONST. Art. I, § 9. Congress has made exhaustion of claims in state court a procedural prerequisite to a grant of habeas corpus relief. 28 U.S.C. § 2254(b)(1). The exhaustion requirement is not, however, jurisdictional. *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Strickland v. Washington*, 466 U.S. 668, 679 (1984); *see* 28 U.S.C. § 2254(b)(1). Rather, the underpinnings of

the exhaustion rule arise out of state-federal comity interests. *Ex parte Royall*, 117 U.S. 241, 251 (1886); *see Strickland*, 466 U.S. at 679; *Rose*, 455 U.S. at 515-518.

This Court has made clear that a petitioner's failure to exhaust state remedies before invoking § 2254 cannot "bar the prisoner from ever obtaining federal habeas review," or "bar the prisoner from raising non-frivolous claims" that a federal court has "yet to review." *Slack v. McDaniel*, 529 U.S. 473, 487 (2000). Indeed, the object of the complete exhaustion rule is not to "'trap the unwary *pro se* prisoner.'" *Id.* at 487 (quoting *Rose*, 455 U.S. at 520). Rather, the exhaustion requirement controls *when* federal claims will be heard in § 2254 cases, not *whether* they will be heard.

This well-established understanding of the role of the exhaustion requirement in § 2254 cases reflects the federal courts' "virtually unflagging obligation to exercise the jurisdiction given them." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-818 (1976); *see also Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1966) ("federal courts have a strict duty to exercise the jurisdiction that is conferred on them by Congress"); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964); *McClellan v. Carland*, 217 U.S. 268, 281 (1910) ("When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction").

In cases where federal jurisdiction exists, district courts have both inherent authority and broad discretion to issue stays. *See Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own

docket"); *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (power to stay proceeding is "inherent in every court" retaining jurisdiction over an action). As this Court has recognized, "[u]nlike the outright dismissal or remand of a federal suit . . . an order merely staying the action 'does not constitute abnegation of judicial duty. On the contrary, it is a wise and productive discharge of it. There is only postponement of decision for its best fruition.'" *Quackenbush*, 517 U.S. at 721 (quoting *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29 (1959)); *see also Harrison v. NAACP*, 360 U.S. 167, 177 (1959) (abstention under which district court retains jurisdiction over federal action pending proceedings in state court does not "involve the abdication of federal jurisdiction, but only the postponement of its exercise").

This Court has endorsed federal court exercise of the inherent authority to stay a proceeding to avert an unfair statute of limitations problem. *See, e.g., Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (as between staying or dismissing an action in favor of parallel state proceedings, "a stay will often be the preferred course, because it assures that the federal action can proceed without risk of a time bar"); *Deakins v. Monaghan*, 484 U.S. 193, 203 n.7 (1988) (approving stay because, "unless [the federal court] retained jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations").[4] Thus, the district

[4] The courts of appeals have likewise held that, when a timely-filed action suffers from a non-jurisdictional procedural defect, the appropriate course is to stay the action in order to avoid a time bar. *See, e.g., Burris v. Farley*, 51 F.3d 655, 659 (7th Cir. 1995) (Easterbrook, J.) (Plaintiffs asserting employment discrimination claims and facing

(Continued on following page)

court's stay of Rhines' federal petition was within the court's inherent authority and consistent with the constitutional and congressional grant of habeas corpus jurisdiction.

B. The Eighth Circuit is alone in refusing to authorize a district court to stay a habeas corpus petition pending total exhaustion as a means of preserving the petitioner's ability to obtain federal review of his claims.

As Justice O'Connor recently observed, the stay-and-abeyance procedure employed by the district court "is not an idiosyncratic one." *Pliler v. Ford*, 124 S.Ct. 2441, 2448 (2004) (O'Connor, J., concurring). On the contrary, with the exception of the Eighth Circuit, the courts of appeals that have addressed the question are unanimous in recognizing a district court's authority to issue a stay to preserve a habeas petitioner's ability to obtain federal review when his initial petition is found to be mixed. *Nowaczyk v. Warden*, 299 F.3d 69, 79-80 (1st Cir. 2002); *Delaney v. Matesauz*, 264 F.3d 7, 13 n.5 (1st Cir. 2001); *Neverson v. Bissonnette*, 261 F.3d 120, 126 n.3 (1st Cir. 2001); *Zarvela v. Artuz*, 254 F.3d 374, 381 (2nd Cir. 2001), *cert. denied*, 534 U.S. 1015 (2001); *Crews v. Horn*, 360 F.3d

exhaustion requirements "may protect themselves by filing . . . in time to satisfy the statute of limitations and asking the district court to suspend proceedings" until additional claims can be exhausted and added to the original Complaint); *Oubichon v. N. Am. Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973) ("in cases where the state agency has been bypassed, the district court should retain jurisdiction for a period sufficient to allow the employee to seek redress through the state agency").

146, 152 (3rd Cir. 2004); *Brewer v. Johnson*, 139 F.3d 491, 493 (5th Cir. 1998); *Palmer v. Carlton*, 276 F.3d 777, 781 (6th Cir. 2002); *Tinker v. Hawks*, 172 F.3d 990, 991 (7th Cir. 1999); *Brambles v. Duncan*, 330 F.3d 1197, 1203 (9th Cir. 2003); *Kelly v. Small*, 315 F.3d 1063, 1070 (9th Cir. 2003); *see also Mackall v. Angelone*, 131 F.3d 442, 445 (4th Cir. 1998), *cert. denied*, 522 U.S. 1100 (1998) (noting without criticism district court order holding federal habeas case in abeyance to allow exhaustion of claims in state court); *Thompson v. Wainwright*, 714 F.2d 1495, 1498 (11th Cir. 1983) ("[A] district court having before it a habeas petition containing only exhausted claims may continue the case at the petitioner's request pending his presenting to the state courts other claims that are not included in the petition and have not been exhausted"); *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000) ("had the district judge dismissed the federal petition [containing unexhausted claims] we would have reversed. . . . [D]ismissal is not proper when that step could jeopardize the timeliness of a collateral attack").

As these courts have recognized, "while it usually is within a district court's discretion to determine whether to stay or dismiss a mixed petition, staying the petition is the only appropriate course of action when outright dismissal 'could jeopardize the timeliness of a collateral attack.'" *Crews*, 360 F.3d at 152 (quoting *Zarvela*, 254 F.3d at 380) (additional internal quotation marks omitted). As the Second Circuit has explained:

> [T]he enactment of AEDPA has altered the context in which the choice of mechanics for handling mixed petitions is to be made. Before AEDPA, there was no statute of limitations. In that context, Justice O'Connor could write, "Our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each on to state court." With unlimited time, a prisoner could leisurely consider all possible federal claims and develop state court writs to exhaust them. After AEDPA, the prisoner has just one year. If he mistakenly comes to federal court too soon, *i.e.*, with one or more unexhausted claims, and does so late in the allotted one year, a dismissal of his mixed petition risks the loss of all of his claims because the one year limitations period will likely expire during the time taken to initiate state court exhaustion and return to federal court after exhaustion is completed.

Zarvela, 254 F.3d at 379 (quoting *Rose*, 455 U.S. at 510). Thus, "there is a growing consensus that a stay is required when dismissal could jeopardize the petitioner's ability to obtain federal review." *Nowaczyk*, 299 F.3d at 79.

It is hardly surprising that the overwhelming majority of courts of appeals have taken this approach. The exhaustion requirement as defined by this Court and codified in § 2254(b) was not designed to trap unwary prisoners and strip them of any opportunity for federal review. *Rose*, 455 U.S. at 520. Rather, it is, and has always been, a rule of timing.

Even the Eighth Circuit recognized this reality, albeit only in part. The Eighth Circuit did not rigidly require that the district court "must dismiss habeas petitions containing both unexhausted and exhausted claims," *Rose*, 455 U.S. at 522, where dismissal would preclude federal review even of Rhines' exhausted claims. *Rhines v. Weber*, 346 F.3d at 799. Instead, the Eighth Circuit remanded to

the district court, noting that its approach did not "preclude a petitioner from electing to forego further state court proceedings, in which case he would presumably proceed on all claims in the federal habeas action and contest any argument by respondent that the unexhausted claims are procedurally barred." *Id.* As will be shown, the Eighth Circuit drew the line in the wrong place.

C. Nothing in the AEDPA prohibits utilization of a stay-and-abeyance procedure.

Neither the text nor the underlying intent of §§ 2254(b) or 2244(d) restricts a federal district court's authority to stay a timely filed habeas petition to allow a petitioner to exhaust federal claims. As a textual matter, nothing in the AEDPA supports the Eighth Circuit rule denying district courts authority to stay mixed petitions. So long as the petition is filed before the one-year statute of limitations of § 2244(d)(1) runs, the stay-and-abeyance procedure satisfies that statutory requirement. Likewise, the stay-and-abeyance procedure does not contravene the requirement that a petition "shall not be *granted*" absent exhaustion of state remedies. 28 U.S.C. § 2254(b)(1) (emphasis added). Indeed, had Congress intended to adopt a rule like that of the Eighth Circuit, § 2254(b)(1) would have been written to expressly prohibit the *filing* of habeas petitions that do not satisfy the total exhaustion requirement to eliminate jurisdiction over any petition containing unexhausted claims. But Congress did not do so, and, as it is codified, the exhaustion requirement is a limitation only on the federal court's authority to grant relief and is not a limitation on federal court jurisdiction or inherent authority to issue a stay.

Furthermore, the stay-and-abeyance procedure is in no way inconsistent with congressional intent. In § 2244(d)(2), Congress specifically provided for unlimited tolling of the limitations period while state post-conviction or other state collateral proceedings are pending. 28 U.S.C. § 2244(d)(2); *Duncan v. Walker*, 533 U.S. 167, 176 (2001). Congress plainly had no intent to require the immediate adjudication of all federal claims irrespective of the time it might take for state collateral review proceedings to take their course. As this Court has recognized, "§ 2244(d)(2) balances the interests served by the exhaustion requirement and the limitation period," and "promotes the exhaustion of state remedies by protecting a state prisoner's ability later to apply for federal habeas relief while state remedies are being pursued." *Duncan*, 533 U.S. at 179. The stay-and-abeyance procedure is but a supplemental method of serving the same interests where a timely filed petition is found to contain both exhausted and unexhausted claims.

In this case, Rhines diligently complied with the AEDPA's limitations period, filing his initial habeas petition with at least 350 days remaining on his one year period. Nothing in the AEDPA suggests a congressional intent to deprive a prisoner like Rhines of the opportunity for habeas relief on the basis of a district court determination – made after the limitations period has expired – that one or more of his claims is unexhausted. If Congress had intended to preclude a district court from utilizing the stay-and-abeyance procedures adopted by the majority of courts of appeals, it could have so legislated. *Hartford Underwriters Ins. Co. v. Union*, 530 U.S. 1, 6 (2000); *see also Williams v. Taylor*, 529 U.S. 420, 431 (2000).

D. Stay-and-abeyance serves the objectives of *Rose v. Lundy*.

The *Rose* decision preceded enactment of the AEDPA by fourteen years. In *Rose*, this Court determined that "because the total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief, we hold that a district court must dismiss petitions containing both unexhausted and exhausted claims." *Rose*, 455 U.S. at 522. In light of the AEDPA and this Court's ruling in *Duncan*, however, dismissal of Rhines' habeas petition does "unreasonably impair the prisoner's right to relief." *Id.* Dismissal of the mixed petition in this case would forever bar Rhines from exercising his right to have a federal court consider the merits of any part of his federal habeas petition. *See Duncan*, 533 U.S. at 181-182. Such an approach would do mischief with *Rose*, because strict adherence to that holding disserves and disregards the reasons behind both the *Rose* holding and the total exhaustion rule.

The total exhaustion rule was "principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings." *Rose*, 455 U.S. at 518. In *Rose*, this Court explained the rationale behind the total exhaustion doctrine as follows:

> Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Id. at 518 (quoting *Dar v. Burford*, 339 U.S. 200, 204 (1950)).

Dismissal of Rhines' petition, however, does not "defer action . . . until courts of another sovereignty . . . have had an opportunity to pass on the matter." *Id.* When a timely filed federal claim is endangered by a statute of limitations issue, the granting of a stay of a mixed petition is the way that a court should defer "action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers . . . have had an opportunity to pass on the matter." *Id.*; *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 278 (1995); *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988). Blind adherence to dismissal of mixed petitions after the passage of AEDPA and the *Duncan* decision does not defer action to state courts; rather, it deprives prisoners like Rhines of their statutory and constitutional right to present the merits of their claims at all in federal court.

The Court in *Rose* reasoned that a "rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Rose*, 455 U.S. at 518-19. A stay of the exhausted claims in a federal petition likewise encourages, and indeed generally requires as a term of the stay, that the prisoner promptly file in state court to seek relief on any unexhausted claims. *See, e.g.*, J.A. at 136; *Zarvela v. Artuz*, 254 F.3d 374, 381 (2nd Cir. 2001), *cert. denied*, 534 U.S. 1015. However, blind adherence to the mandate of *Rose* to dismiss mixed petitions, after the *Duncan*

decision, does not allow "prisoners to seek full relief first from state courts." *Rose*, 455 U.S. at 518-19. Rather, such a dismissal deprives prisoners of their right to have a federal court consider a timely filed § 2254 petition on its merits if the petitioner had the misfortune of having his one-year AEDPA limitations period lapse before the district court determined the petition to be mixed.

The Court in *Rose* contemplated, as was the case in 1982, that a prisoner could return to state court and exhaust remaining issues without jeopardy to returning to federal court. Before AEDPA, the Court in *Rose* observed that dismissal of a mixed petition meant "leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending *or resubmitting* the habeas petition to present only exhausted claims to the district court." *Id.* at 510 (emphasis added). Under the AEDPA as interpreted by *Duncan*, the dismissal of a timely filed federal habeas claim that had the one-year § 2244(d) limitation period lapse during its pendency does not permit the prisoner to pursue state court remedies without jeopardy to return to federal court and certainly does not permit "resubmitting" the federal habeas claim after dismissal. Indeed, the dismissal of such a timely filed federal habeas claim that had the one year lapse during its pendency would extinguish any opportunity for consideration of the merits of any claim, exhausted or unexhausted, in federal court.

Indeed, the various manners in which the holding is expressed within *Rose* indicated that the *Rose* Court never meant the total exhaustion rule to frustrate return to state court to exhaust claims or to bar federal court consideration of the merits of exhausted claims. At its conclusion, the *Rose* decision stated: "We hold that a district court

must dismiss habeas petitions containing both unexhausted and exhausted claims." *Id.* at 5[illegible] However, the Court at the outset of the *Rose* opinion indicated that the district court did not need to dismiss the petition, but could allow amendment of the petition by stating "that a district court must dismiss such "mixed petitions," leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Id.* at 510. Meanwhile, the plurality of the Court noted that "[a] total exhaustion rule will not impair [the interest of a prisoner in speedy federal relief] since he can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all claims." *Id.* at 520. (plurality opinion).

In sum, the underlying assumption in *Rose* – that a petitioner could have his claim dismissed, exhaust claims in state court, and then return to federal court thereafter with a fully exhausted petition – no longer holds true in the aftermath of *Duncan*. The requirement in *Rose* of dismissal of mixed petitions turned on the fact, true in 1982 and not so today, that there would be no jeopardy to any prisoner's right to later seek federal habeas relief by virtue of having a mixed federal petition exhausted. *See id.* at 510.

E. Stay-and-abeyance is fully consistent with this Court's decisions in *Duncan v. Walker* and *Pliler v. Ford*.

While the Court did not squarely address the propriety of a stay-and-abeyance procedure in either *Duncan* or *Pliler*, several Justices took the opportunity in those cases

to express their approval of such an approach as a means of facilitating exhaustion while avoiding unfairness. For example, in *Duncan*, Justice Stevens concurred in the Court's judgment, and expressly agreed with the Court's reading of § 2244(d)(2). *Duncan*, 533 U.S. at 182. Justice Stevens recognized the importance of providing appropriate "safeguards against the potential for injustice that a literal reading of § 2244(d)(2) might otherwise produce." *Id.* at 184. With regard to such safeguards, Justice Stevens noted:

> [A]lthough the Court's pre-AEDPA decision in *Rose* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies. Indeed, there is every reason to do so when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but meritorious claims. *See* 28 U.S.C. § 2254(b)(2) (1994 ed., Supp. V), and when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1 year limitations period.

Duncan, 533 U.S. at 182-183 (Stevens, J., concurring). Justice Souter, who joined the Court's opinion "in full," also joined Justice Stevens "in pointing out that nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies." *Id.* at 182.

In *Pliler*, three more Justices noted the possibility of stay-and-abeyance as a solution to the difficulties produced by *Duncan*'s application in mixed petition cases. First, Justice O'Connor observed that the Court had not

been required to address the "propriety of the stay-and-abeyance procedure," but went on to note that "the procedure is not an idiosyncratic one; as Justice Breyer describes . . . seven of eight Circuits to consider it have approved stay-and-abeyance as an appropriate exercise of a district court's equitable powers." *Pliler*, 124 S.Ct. at 2448 (O'Connor, J., concurring).[5] Justice Breyer went further, describing the stay-and-abeyance procedure and asking, "What could be unlawful about this procedure?" *Id.* at 2449 (Breyer, J., dissenting). Justice Breyer also explained that, "after *Duncan*, the dismissal of [a mixed] petition will not simply give state courts a chance to consider the unexhausted issues . . . ; it often also means the permanent end of *any* federal habeas review," and that stay-and-abeyance "recognizes the comity interests that *Rose* identified, and it reconciles those interests with the longstanding constitutional interest in making habeas corpus available to state prisoners." *Id.* at 2450 (Breyer, J., dissenting) (emphasis in original). Justice Ginsburg registered the view that resolution of the propriety of stay-and-abeyance is "pivotal," and noted that "[a] related question also postponed by the Court's opinion is whether

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[5] Justice O'Connor, in her concurrence in *Pliler*, noted that an affirmatively misled petitioner, whether by the court or the state, should be entitled to equitable tolling of his limitation period. *Pliler*, 124 S.Ct. at 2448 (O'Connor, J., concurring); *see also Duncan*, 533 U.S. at 183 (Stevens, J., concurring.) In this case, Rhines filed a Motion to Toll Time and the state responded by advising that the Motion to Toll Time was unnecessary and that Rhines was "in no danger of losing his right to file for federal habeas corpus relief" because only eight or fourteen days had run in his one year AEDPA period. J.A. 33. The district court agreed that the Motion to Toll Time was unnecessary. J.A. 35. At a minimum, if this Court decided not to approve the stay-and-abeyance procedure, the Court should equitably toll the one year AEDPA period as to Rhines.

the solution in *Rose* . . . to a mixed petition – dismissal without prejudice – bears reexamination in light of the one-year statute of limitations . . . " *Pliler*, 124 S.Ct. at 2448 & n.2 (Ginsburg, J., dissenting). While concurring in the Court's decision to remand in *Pliler*, Justice Stevens, joined by Justice Souter, "fully agree[d] with the views expressed by Justice Ginsburg and Justice Breyer (dissenting opinions)." *Pliler*, 124 S.Ct. at 2448 (Stevens, J. concurring).

There is nothing in either *Duncan* or *Pliler* that precludes a stay as a means for a district court to deal with the situation where the one year AEDPA statute of limitations runs during the pendency of a timely filed mixed petition. Indeed, the only justices who have reached the issue in *Pliler* and *Duncan* have indicated that a stay would be appropriate under these circumstances.

III. Stay-and-abeyance is a necessary safeguard against the potential for unfairness occasioned by *Duncan*.

A. The need for a safe and effective mechanism is acute.

In two recent cases, this Court concluded that Congress through the AEDPA did not want to deprive state prisoners of federal habeas corpus review. In *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998), this Court held that a federal habeas petition filed after the initial filing was dismissed as premature, should not be deemed a "second or successive" petition barred by § 2244, lest "dismissal . . . for technical procedural reasons . . . bar the prisoner from ever obtaining federal habeas review." *Id.* at 645. In *Stewart*, this Court reasoned:

> "But none of our cases expounding this doctrine [from *Rose* of dismissal of mixed petitions] have ever suggested that a prisoner whose habeas petition was dismissed for failure to exhaust state remedies, and who then did exhaust those remedies and returned to federal court, was by such action filing a successive petition. A court where such a petition was filed could adjudicate these claims under the same standard as would govern those made in any other first petition.
>
> . . . [The prisoner's habeas] claim here – previously dismissed as premature – should be treated in the same manner as the claim of a petitioner who returns to a federal habeas court after exhausting state remedies . . . To hold otherwise would mean that a dismissal of a first habeas petition for technical procedural reasons would bar the prisoner from ever obtaining federal habeas review.

Id. at 644-45 (citations omitted).

Similarly, in *Slack*, this Court held that a federal habeas petition filed after dismissal of an initial petition for nonexhaustion should not be deemed a "second or successive petition," lest "the complete exhaustion rule" becomes a "trap" for the "unwary pro se prisoner." *Slack*, 529 U.S. at 487 (quoting *Rose*, 455 U.S. at 520). The Court's concern about avoiding making habeas law a trap for the unwary *pro se* litigant is valid. As Justice Breyer noted in both *Duncan* and *Pliler*:

- 93% of habeas petitioners are *pro se*.
- 63% of all habeas petitions are dismissed.

- 57% of those habeas petitions are dismissed for failure to exhaust.
- District Courts took an average of 268 days to dismiss petitions on procedural grounds.

Pliler, 124 S.Ct. at 2450 (Breyer, J., dissenting); *Duncan*, 533 U.S. at 186 (Breyer, J., dissenting); *see U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review: Challenging State Court Criminal Convictions* 17 (1995) at 23-24.[6]

Rhines initially was a *pro se* petitioner. His federal habeas petition was before the United States District Court for the District of South Dakota for slightly in excess of sixteen months before the court ruled it to be a mixed petition. Rhines' experience with the AEDPA limitation running during the pendency of his habeas petition probably is not unusual. What might be unusual in Rhines' case is how diligent he was in timely filing the federal habeas petition, by Respondent's own admission, when only 8 to 14 days had run on his AEDPA limitation period. *See* J.A. 32-33.

In addition, the question of whether a claim is exhausted often can be difficult for lawyers and judges, let alone *pro se* habeas corpus petitioners to discern. *See, e.g., Evicci v. Commissioner of Corrections*, 266 F.3d 26, 28 (1st Cir. 2000) (vacating district court's dismissal for exhaustion, and remanding for further proceedings); *Morgan v. Bennett*, 204 F.3d 360, 369-372 (2nd Cir. 2000) (disagreeing with district court's conclusion that claim had not been

[6] A copy of this publication is at http://www.ojp.gov/bjs/pub/pdf/fhcrcscc.pdf. The publication was compiled in 1995 by the Department of Justice, and apparently has not been updated.

adequately presented to state courts; remanding for merits consideration); *Bear v. Boone*, 173 F.3d 782, 784-785 (10th Cir. 1999) (reversing district court's nonexhaustion ruling and remanding for merits review). Indeed, in Rhines' case, Respondent asserted that 12 of the approximately 35 individual claims in Rhines' Amended Petition were not exhausted, yet the district court found that four of those challenged claims were exhausted. J.A. 128-133.

B. Stay-and-abeyance is fair and workable.

As this Court has noted, a "prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims." *Rose*, 455 U.S. at 520 (plurality decision); *see also Pliler*, 124 S.Ct. at 2446. ("It is certainly the case that not every litigant seeks to maximize judicial process"). Rhines faces a death sentence and has mixed goals of wanting quick resolution of constitutional claims that may alter his conviction or sentence, but desiring to delay the carrying out of the ultimate sentence. However, the vast majority of prisoners who find themselves in the dilemma created by the running of the AEDPA limitation during the pendency of their federal case have no incentive to delay presentation of habeas corpus claims. According to Department of Justice statistics, there were 58,257 habeas corpus filings in 2000, 274 of which involved a petitioner facing the death penalty. *U.S. Dept. of Justice, Bureau of Justice Statistics, Special Report, Prisoner Petitions filed in U.S. District Courts, 2000, with Trends 1980-2000* at p. 3 (Table 2).[7] Thus, only .47% of those habeas petitioners

[7] This report is available through http://www.ojp.usdoj.gov/bjs/ and is entitled "Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000."

(approximately one out of every 213) are under a penalty of death. Specifically for the federal habeas filings arising out of state court convictions, there were 46,371 filings in 2000, of which 259 involved death penalty sentences. *Id.* This is roughly .558% of the filings, or approximately one out of every 179 petitioners.

Moreover, a court has many ways to deal with a petitioner who is seeking delay. By way of illustration, in this case, the district court required as a term of the stay that Rhines file his state habeas corpus petition within sixty days of the court's order and that Rhines return to federal court within sixty days of completion of his second habeas corpus petition. J.A. 136. These conditions on such a stay are not unusual. *See, e.g.*, *Zarvela*, 254 F.3d at 380-81; *Palmer*, 276 F.3d at 781.

Indeed, through a discretionary stay, federal district courts have the flexibility to prevent abuse of the writ or vexatious litigation. Although the granting of a stay ordinarily would be appropriate when a post-exhaustion filing otherwise would be time-barred, district courts may deny a stay or permission to amend when a petitioner has not exercised reasonable diligence. *See Zarvela*, 254 F.3d at 380-81. The district court may revoke the stay if the petitioner does not act diligently or consistent with the stay. *See Palmer*, 276 F.3d at 781. District courts may condition or limit not only their stays, but also what later amendments to the federal habeas petition that they will allow. For example, the district court can grant a stay but order that the prisoner present only fully exhausted claims in his next federal pleading. *See Slack*, 529 U.S. at 489. In granting a stay, a district court has broad discretion to set the terms, because the stay procedure is rooted in the equitable power and the sound discretion of the court,

allowing for a case-by-case approach that precludes or deters abusive tactics without foreclosing federal review for diligent and good-faith litigants.

This Court already has addressed the concern that prisoners could abuse the writ through successive petitions. In *Slack*, the Court stated:

> The State expresses concern that, upon exhaustion, the prisoner would return to federal court but again file a mixed petition, causing the process to repeat itself. In this manner, the State contends, a vexatious litigant could inject undue delay into the collateral review process. To the extent the tactic would become a problem, however, it can be countered without upsetting the established meaning of a second or successive petition.
>
> First, the State remains free to impose proper procedural bars to restrict repeated returns to state court for post-conviction proceedings. Second, provisions of AEDPA may bear upon the question in cases to which the Act applies . . . Third, the Rules of Civil Procedure, applicable as a general matter to habeas cases, vest the federal courts with due flexibility to prevent vexatious litigation. As Slack concedes, in the habeas corpus context it would be appropriate for an order dismissing a mixed petition to instruct an applicant that upon his return to federal court he is to bring only exhausted claims. *See* Fed. Rules Civil Proc. 41(a) and (b). Once the petitioner is made aware of the exhaustion requirement, no reason exists for him not to exhaust all potential claims before returning to federal court. The failure to comply with an order

of the court is grounds for dismissal with prejudice. Fed. Rule Civ. Proc. 41(b).

Slack, 529 U.S. at 488-89.

C. Rejection of stay-and-abeyance as a safeguard would contravene this Court's longstanding commitment to ensuring that prisoners receive one full and fair opportunity to seek habeas relief.

The writ of habeas corpus is guaranteed by the United States Constitution. Although the scope of the writ has changed over the years, the importance of its continuing availability is not subject to genuine debate. As Justice Frankfurter wrote more than half a century ago:

> The uniqueness of habeas corpus in the procedural armory of our law cannot be too often emphasized. It differs from all other remedies in that it is available to bring into question the legality of a person's restraint and to require justification for such detention. Of course this does not mean that prison doors may readily be opened. It does mean that explanation may be exacted why they should remain closed. It is not the boasting of empty rhetoric that has treated the writ of habeas corpus as the basic safeguard of freedom in the Anglo-American world. "The great writ of habeas corpus has been for centuries esteemed the best and only sufficient defence of personal freedom." Mr. Chief Justice Chase, writing for the Court, *Ex parte Yerger*, 8 Wall., 85, 95. Its history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating

> factors between our democracy and totalitarian governments.

Brown v. Allen, 344 U.S. 443, 512 (1953) (opinion of Frankfurter, J.). This Court echoed these sentiments more recently, observing that "[d]ismissal of a first federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely, risking injury to an important interest in human liberty." *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996).

There is no reason to believe that Congress meant, in the AEDPA or in any other statute, to revoke the right to federal habeas corpus relief for prisoners who timely file a habeas corpus petition which is subsequently determined to be mixed. Statistically, the majority of *pro se* litigants can be expected to file mixed petitions. As Justice Stevens noted, however, "Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA." *Duncan*, 533 U.S. at 183 (Stevens, J., concurring).

CONCLUSION

Petitioner Rhines requests that the judgment of the United States Court of Appeals for the Eighth Circuit in this case be reversed and that the Court hold that the

district court did not err in granting a conditional stay of Rhines' federal habeas corpus petition.

Respectfully submitted,

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In The

Supreme Court of the United States

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENT ON THE MERITS

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CAPITAL CASE

QUESTION PRESENTED

May a federal court stay, rather than dismiss, a habeas application by a state prisoner where the petition is "mixed" in that it includes both exhausted and unexhausted claims, where the state prisoner had an opportunity to present the claims in state court but failed to do so, and where the state prisoner may now pursue all of his exhausted claims in federal court?

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DECISIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 346 F.3d 799 (8th Cir. 2003) and is reprinted in the Joint Appendix. JA 145. The Order of the United States District Court for the District of South Dakota is unreported but is set out in the Joint Appendix. JA 127. It is this Order that was under appeal to the Eighth Circuit and which is now before this Court.

In addition, decisions of the state courts are set forth in the Joint Appendix. *Rhines v. Weber*, reported at 608 N.W.2d 303, 2000 S.D. 19 (JA 292). The Findings of Fact, Conclusions of Law, and Order of the Circuit Court for the Seventh Judicial Circuit in Petitioner's state habeas case are set out at JA 246. The decision of the South Dakota Supreme Court on direct appeal, *State v. Rhines*, 548 N.W.2d 415, 1996 S.D. 55, is set out at JA 149. The Judgment of Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota, finding Petitioner guilty of first degree murder and sentencing him to death is set out at JA 16.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered October 7, 2003. JA 147. The Petitioner's Motion for Rehearing and for Rehearing En Banc was denied November 24, 2003. JA 148. The Petition for Certiorari was filed February 19, 2004. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

28 U.S.C. § 2244(d):

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be

counted toward any period of limitation under this subsection.

28 U.S.C. § 2254(b) and (c):

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –.

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

STATEMENT OF THE CASE

The question presented is whether a federal court must, under *Rose v. Lundy*, 455 U.S. 509 (1982) and *Duncan v. Walker*, 533 U.S. 167 (2001), dismiss a habeas corpus petition containing both exhausted and unexhausted issues (a "mixed petition"), unless the petitioner dismisses the unexhausted issues. Petitioner asked below that his petition be stayed, without dismissal, and the district court did so. JA 127. The Eighth Circuit reversed, holding the district court lacked that power. JA 145. Respondent Weber (hereafter "the State") asks this Court to affirm that holding.

A. Underlying Facts.

In late 1991 and early 1992, Charles Russell Rhines was an employee of the Dig 'Em Donut Shop on West Main Street in Rapid City, South Dakota. The doughnut shop terminated Rhines' employment in February 1992. JA 149. On March 8, 1992, the body of Donnivan Schaeffer, a part-time employee of the doughnut shop, was found in the doughnut shop storeroom. His hands were bound and he had been repeatedly stabbed. Approximately $3,300 was missing from the store. JA 149.

Petitioner Charles Russell Rhines was arrested in King County, Washington, for burglary in that state. JA 150. After questioning in both Seattle, Washington (JA 151-52), and Rapid City, South Dakota, Petitioner admitted, in a graphic manner, that he had burglarized the doughnut shop and killed Donnivan Schaeffer. JA 233-35. Petitioner stated that he had first stabbed Schaeffer in the stomach, causing him to collapse to the floor. JA 234. The second thrust of Petitioner's knife pierced Schaeffer's lung,

and he began to plead for his life. JA 234. Petitioner then assisted Schaeffer to the back of the doughnut shop, to a storeroom, where he administered what he referred to as the "coup de grâce" (intentionally stabbing the victim in the base of the skull). During this time, the victim seemed to anticipate his own death. JA 234. When the interrogating officers suggested that the victim might have been tied up before the last stab wound, Petitioner stated that it was too bad that the pathologist was not there to watch, and burst into laughter. JA 235. In further explaining his victim's movements, he drew an analogy to butchered chickens. JA 235. A jury convicted Petitioner of first degree murder and sentenced him to death. JA 150.

B. Direct Appeal Proceedings.

After conviction, Petitioner appealed his conviction and sentence to the South Dakota Supreme Court. That court affirmed the conviction on May 15, 1996. JA 149. Petitioner was represented by three attorneys from separate offices on his direct appeal. JA 149. Issues raised included impropriety of *Miranda* warnings prior to his confession (JA 150-61); waiver of *Miranda* rights (JA 161-63); excusing of a juror for cause in light of her views on the death penalty (JA 163-72); alleged improper use of peremptory challenges by the State (JA 172-77); the constitutionality of South Dakota's capital punishment statutes (JA 177-87); admission of certain statements relative to the criminal justice system (JA 187-92); refusal of the trial court to appoint a "forensic communication expert" to assist Rhines in case preparation (JA 193-96); refusal of three jury instructions regarding aggravating circumstances, presumption of life imprisonment, and the effect of a death sentence (JA 196-200); propriety of allowing

victim impact testimony during the sentencing phase (JA 201-06); propriety of the trial court's definition of depravity of mind (JA 206-12); propriety of submitting the killing to receive money issue to the jury (JA 213-15); propriety of submitting the torture aggravator to the jury (JA 216-20); invalidity of one aggravating circumstance and the effect of the invalidity (JA 220-23); whether Petitioner's death sentence was imposed under influence of passion, prejudice, or other arbitrary factors (JA 223-25); whether Petitioner's death sentence was lawfully imposed (JA 226-27); and whether Petitioner's death sentence was proportionate to the sentences in other death penalty cases (JA 227-35). After considering each of these issues, the South Dakota Supreme Court affirmed Petitioner's conviction and death sentence, finding, among other things, that even though there was one invalid aggravating circumstance, the existence of three other valid aggravating circumstances in a nonweighing state such as South Dakota made the fact of the invalid circumstance harmless error. JA 222-23, 235.

Following the affirmance of his conviction and death sentence, Petitioner sought certiorari from the direct appeal decision. This Court denied certiorari on December 2, 1996. *Rhines v. South Dakota*, 519 U.S. 1013 (1996).

C. State Habeas Proceedings.

Petitioner filed an application for writ of habeas corpus in the Circuit Court for the Seventh Judicial Circuit, Pennington County, South Dakota on December 5, 1996. JA 248. This application was amended for the second time on September 17, 1997, *id.*, and the habeas trial court held an evidentiary hearing on April 6, 1998. *Id.* The court

issued its findings of fact, conclusions of law, and order denying state habeas corpus relief on November 16, 1998. *See* habeas trial court's findings. JA 246. The findings are extensive, and the court denied a number of claims, including ineffective assistance of trial and appellate counsel (twenty-six separate allegations of ineffective assistance) (JA 271-85); allegations dealt with in Conclusions of Law 42 through 59, which mirrored contentions rejected on direct appeal (JA 285-89); and miscellaneous allegations of prosecutorial misconduct. JA 289-90.

Following this ruling in the habeas trial court, Petitioner appealed to the South Dakota Supreme Court, which affirmed the circuit court ruling in a decision issued February 9, 2000, *Rhines v. Weber* (JA 292). The court reiterated its ineffective assistance of counsel standards, which mirrored those of *Strickland v. Washington*, 466 U.S. 668 (1984). JA 296-98. The state court rejected each of Petitioner's allegations of ineffective assistance, including an allegation that counsel should have argued Petitioner's confession was involuntary. JA 299-300. The court found that the confession was voluntary for the reasons set out in the opinion. JA 300-301. The court also rejected a contention that it was required to engage in an extended harmless error analysis (*see Sochor v. Florida*, 504 U.S. 527, 532 (1992)) before it could find that an invalid aggravating circumstance was harmless error. JA 310-16. Other issues were found to be barred by res judicata. JA 316. The court's decision was unanimous. JA 317.

D. Federal Habeas Proceedings – District Court.

Following rejection of his state habeas corpus appeal on February 9, 2000, Petitioner sought habeas corpus in the United States District Court for the District of South Dakota, Southern Division. JA 3. The petition asserted approximately thirty-five claims, four of which Petitioner later admitted had not been asserted in the prior state court proceedings. JA 39.

The federal habeas petition was timely, as fewer than three weeks had run on the one-year limitations period set forth in 28 U.S.C. § 2244(d)(1) when the petition was filed. JA 33. Petitioner moved, pro se, that the court toll the habeas statute of limitations so he could amend his petition. In response to Petitioner's motion (filed before *Duncan v. Walker*, 533 U.S. 167 (2001)), the State did not directly argue that the statute of limitations time ran during pendency of his federal habeas petition. *Id.* The State did not admit that a second habeas case could be brought if the first were dismissed. *Id.* It was in this context that the State resisted Petitioner's pro se motion, stating that "at least for the present case" Petitioner would not lose his right to file an amended petition, further recognizing that "if the present case is dismissed Petitioner could be in danger." JA 33. The district court denied this motion. JA 35.

The district court entered an amended procedural order, requiring that the issues of exhaustion of state court remedies on the one hand and the merits of the petition on the other be resolved separately, with exhaustion being resolved first. JA 36. On July 3, 2002, the district court ruled that Petitioner had exhausted twenty-seven of his approximately thirty-five claims, but had not exhausted eight. (The State contended there were twelve unexhausted

issues; Petitioner stipulated four were unexhausted; and the court found four additional issues unexhausted. JA 128-33.)

The district court did not require dismissal of any claims, but held the entire petition in abeyance. In this respect, the district court's ruling went further than that of the Ninth Circuit in *Ford v. Hubbard*, 305 F.3d 875 (9th Cir. 2002), *amended by* 330 F.3d 1086 (9th Cir. 2003), *rev'd sub nom. Pliler v. Ford*, 124 S.Ct. 2441 (2004), which required the petitioner to dismiss his unexhausted claims in order to invoke the stay and abeyance procedure. The district court here, by contrast, did not require the purging of unexhausted claims from the petition. The petition, as amended and including all claims, remains on file with the district court. After the district court entered this order, Petitioner returned to state court and filed his second petition for state habeas corpus relief. *See* Notice of Filing (district court docket, No. 121).

E. Federal Habeas Proceedings – Court of Appeals.

The Eighth Circuit reversed and vacated the district court's order of "stay and abeyance," holding that habeas claims may not be stayed while Petitioner seeks state court remedies on claims that are unexhausted. JA 145. The Eighth Circuit held that while the petition could not be stayed, Petitioner had a likely right to delete unexhausted claims while proceeding only on the claims that he believes are fully exhausted, or he could contest any contention that claims were unexhausted and proceed with his federal habeas petition. JA 146. The Eighth Circuit remanded the case to the district court to consider

either (1) the deletion of unexhausted claims or (2) Petitioner's contentions regarding nonexhaustion. *Id.*

The State agrees with the remand, and does not argue that the entire case must be dismissed, *unless* Petitioner refuses to dismiss unexhausted claims. The Eighth Circuit denied rehearing and rehearing en banc November 24, 2003. JA 148. Petitioner filed a timely Petition for Writ of Certiorari February 19, 2004. This Court granted certiorari June 28, 2004.

SUMMARY OF ARGUMENT

This Court has long required dismissal of federal habeas petitions containing both exhausted and unexhausted claims, as a part of "[a] rigorously enforced total exhaustion rule. . . ." *Rose v. Lundy*, 455 U.S. 509, 518 (1982). This rule "encourage[s] state prisoners to seek full relief first from the state courts. . . ." *id.*, and provides a "simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Id.* at 520. This instruction has multiple purposes: It prevents the "unseemly" result of "a federal district court . . . upset[ing] a state court conviction without an opportunity to the state courts to correct a constitutional violation," *id.* at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)); it encourages state prisoners to seek full relief from state courts, *id.*; it increases the potential hospitability of the state courts to federal constitutional issues, *id.* at 519; it relieves the federal courts from the task of distinguishing between exhausted and unexhausted claims, *id.* at 519; it makes the process simpler by requiring that all claims be

exhausted before any claim is brought to federal court; and it reduces piecemeal litigation by making it more likely that all the prisoner's claims will be considered in a single proceeding. *Id.* at 520. Where, as here, there are admittedly unexhausted claims, dismissal, or voluntary withdrawal of unexhausted claims, simplifies both state and federal proceedings. *Rose* adopted this requirement even though nearly all courts of appeals held the opposite. Congress did not abrogate *Rose* when it passed AEDPA, but retained the exhaustion requirement. 28 U.S.C. § 2254(b).

Congress adopted a policy under AEDPA to streamline and speed up the federal habeas process. At best, a stay and abeyance procedure promotes or creates additional delay. While Petitioner claims that most habeas petitioners have no incentive to delay, he admits that this is not true for him as a death-sentenced inmate. Petitioner's Brief at 27. And in fact nondeath-sentenced habeas petitioners sometimes have incentives to create delay as well. Delay can prejudice the state in responding to a habeas petition litigated years after the fact. In the past, the doctrine of abuse of the writ has been available to ameliorate certain time-based prejudice. *See* Rule 9, Rules Governing Habeas Corpus Cases Under Section 2254 (hereinafter Federal Habeas Rules). With the passage of the habeas statute of limitations, however, this Court will revise Rule 9 to eliminate the abuse of the writ provisions (effective December 1, 2004). Thus, only the statute of limitations will be available to defend against delay-induced prejudice. Petitioner and his allies apparently desire to neutralize the statute to the point that delay is inevitable.

Petitioner's arguments, moreover, are a back-door attack on several of this Court's decisions. One of those is

Duncan v. Walker, 533 U.S. 167 (2001), which specifically held that the limitation period is not tolled by filing a petition in federal court. "Stay and abeyance" is a procedure manufactured by lower federal courts to neutralize *Duncan's* holding and to in effect toll the statute during the precise period where Congress and this Court provided that it would not be tolled. Thus, even though Congress provided no tolling during this period, as *Duncan* found, stay and abeyance would toll the statute during this same period.

Petitioner is not presently in danger of having his case dismissed. The Eighth Circuit remanded the case to the district court to consider whether the case ought to be dismissed, but also to determine whether Petitioner should be allowed to delete unexhausted claims from his petition, forego further state proceedings (or indeed to pursue such proceedings separately), or possibly "proceed on all claims in the federal habeas action and contest any argument by Respondent that the unexhausted claims are procedurally barred." *Rhines v. Weber* (JA 146). Respondent does not contest this remand. Petitioner is thus in no danger of losing all federal remedies, although he may well be in danger of losing some issues that have not been previously exhausted. This result, however, is brought about by this Court's requirement that issues be raised first in state court before Petitioner comes to federal court. *Rose*, 455 U.S. at 518. A stay and abeyance procedure does away with *Rose's* requirement and makes the statute of limitations largely ineffective. Petitioner's arguments are thus a back-door attack on AEDPA and its purpose of reducing delay in the federal habeas process.

ARGUMENT

I. INTRODUCTION.

This case raises important issues of federalism and the relationship of the states with the lower federal courts. In *Rose v. Lundy*, this Court stated that "[a] rigorously enforced total exhaustion requirement will encourage state prisoners to seek full relief first from the state courts," 455 U.S. at 518. This requirement is a continuing part of federal habeas jurisprudence. The Court instituted this requirement in spite of the fact that the vast majority of circuit courts of appeals (eight of ten) had allowed district courts to proceed to the merits of exhausted federal habeas issues when a petition contained both exhausted and unexhausted claims. *Rose*, 455 U.S. at 513. n.5. The Court plurality held that the petitioner had a choice: Allow the mixed petition to be dismissed, or seek adjudication on the merits of those issues that had been exhausted in the state courts. *Rose*, 455 U.S. at 520-21.

This foundation of a total exhaustion requirement has remained as a bedrock principle of federal habeas corpus law, and this Court has repeatedly recognized the correctness of this principle. *Pliler v. Ford*, 124 S.Ct. 2441, 2444 (2004); *Duncan*, 533 U.S. at 179; *Slack v. McDaniel*, 529 U.S. 473, 478-79 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 843-44 (1999); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489 U.S. 346, 349 (1989). Stay and abeyance was not available under *Rose*. Congress was also aware of the exhaustion requirement when it passed the Antiterrorism and Effective Death Penalty Act. The Act adopted a statute of limitations for federal habeas corpus and retained the statutory exhaustion requirement explained in *Rose*. 28 U.S.C. § 2254(b), (c); *see* 141 Cong. Rec. S7803-01 at S7847 (daily ed. June 7, 1995) (statement

of Senator Specter: "[T]his bill does not abolish the exhaustion requirement.").

The existence of *Rose*, together with the statute of limitations, 28 U.S.C. § 2244(b), has the potential to streamline habeas proceedings as Congress intended. Petitioner, and the lower courts that support his request for "stay and abeyance," would cripple both *Rose* and AEDPA by granting Petitioner tolling where Congress and this Court have said there is none. *Duncan*, 533 U.S. at 177-78. This Court should ensure that the congressional purpose and the purposes of *Rose* are accomplished by refusing to allow a tactic, the purpose and effect of which would be delay beyond those delays available before Congress acted, and to grant tolling of the statute where Congress granted none. *Duncan*, 533 U.S. at 177-78. Petitioner seeks not only to eviscerate the statute of limitations, but also to undermine the total exhaustion rule of *Rose*. The statute of limitations enacted by AEDPA ought to provide an occasion to enforce, rather than eliminate or undermine, *Rose*.

The natural consequence of this statute of limitations is that some petitioners will not be able to present claims where they might have been able to do so before. When combined with *Rose*, 455 U.S. at 520: "before you bring any claims to federal court, be sure that you first have taken each one to state court," the statute of limitations can lead to loss of certain claims that have not been taken to state court before a petitioner files in federal court. This is not improper, unfair, or contrary to congressional intent because it does not deprive Petitioner of relief, except as to those individual claims that "[he] first [has not] taken . . . to state court." *Id.*

II. A "STAY AND ABEYANCE" PROCEDURE IS INCOMPATIBLE WITH THE EXHAUSTION RULE UNDER *ROSE V. LUNDY*, 455 U.S. 509 (1982) AND THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT (AEDPA).

A. "Stay and Abeyance" Is Contrary to *Rose v. Lundy*.

The issue in this case is whether district courts are permitted to use a procedure referred to as "stay and abeyance," when dealing with federal habeas petitions by persons in custody pursuant to the judgments of state courts. "Stay and abeyance" allows a habeas petitioner to stay procedures in federal court, hold the federal action "in abeyance," and the federal action is not dismissed. Such a procedure is contrary to specific directions from this Court in *Rose*, 455 U.S. at 520: "our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." Further, this Court has stated in *Rose*, that "a rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Id.* at 518-19. This Court has recently recognized the vitality of *Rose*, affirming the principle that "the state prisoner must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a federal habeas petition." *O'Sullivan*, 526 U.S. at 842 (exhaustion must include a request for any discretionary review available in the state's highest court). *See also Duncan*, 533 U.S. at 179 (citing *Rose's* reference to the "rigorously enforced total exhaustion rule") and noting that "diminution of statutory

incentives to proceed first in state court would also increase the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce," *id.* at 180; *Pliler*, 124 S.Ct. at 2444 ("under *Rose*, federal district courts must dismiss 'mixed' habeas corpus petitions").

A "stay and abeyance" procedure does away with the rigorously enforced exhaustion requirement. Under stay and abeyance, there is no real exhaustion requirement at all. As applied by the courts of appeals,[1] "stay and

[1] *Crews v. Horn*, 360 F.3d 146 (3d Cir. 2004) (stay is appropriate where dismissal could jeopardize timeliness of collateral attack – court *should not* dismiss even the unexhausted claims); *Griffin v. Rogers*, 308 F.3d 647 (6th Cir. 2002) (court applied equitable tolling where case had first been dismissed, but stated a preference for staying petition); *Ford v. Hubbard*, 305 F.3d 875 (9th Cir. 2002), *amended by* 330 F.3d 1086 (2003), *rev'd sub nom. Pliler v. Ford*, 124 S.Ct. 2441 (2004) (dismissal was "prejudicial error"; amendment procedures and relation back apply; unexhausted claims must be dismissed but can be reasserted after exhaustion); *Nowaczyk v. Warden*, 299 F.3d 69 (1st Cir. 2002) (petition was *not* mixed, but presented only exhausted claims, another state petition was pending presenting issues *not* raised in the federal petition. *Held*: District court *could* stay such a petition; dicta favors mixed petition stay and abeyance); *Newell v. Hanks*, 283 F.3d 827 (7th Cir. 2002) (approves stay and abeyance, although district court actually dismissed petition and later vacated the dismissal); *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002) (adopts stay and abeyance, but finds petitioner waited too long after exhaustion to reinstate dismissed unexhausted claims); *Delaney v. Matesanz*, 264 F.3d 7 (1st Cir. 2001) (dicta favors stay and abeyance); *Neverson v. Bisonnette*, 261 F.3d 120 (1st Cir. 2001) (stay and abeyance considered in dicta; case remanded to consider equitable tolling); *Zarvela v. Artuz*, 254 F.3d 374 (2d Cir. 2001) (allows a stay and abeyance; generally requires refiling in both state and federal court to be taken within thirty days); *Anthony v. Cambra*, 236 F.3d 568 (9th Cir. 2000) (stay and abeyance required; unexhausted claims dismissed; refiling of unexhausted claims following exhaustion relates back to original filing); *Freeman v. Page*, 208 F.3d 572 (7th Cir. 2000) (dicta suggests filing in both courts and stay of federal action; petition *held* untimely); *Tinker v. Hanks*, 172 F.3d 990 (7th Cir. 1999) (same); *Brewer v. Johnson*, 139 F.3d 491 (5th Cir. 1998) (district court

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abeyance" allows a district court to either dismiss the unexhausted claims, as in the Ninth Circuit, or retain all claims, as in the Third and Seventh Circuits; enter a stay for (usually) an indefinite period; require a return to state court; and then require a return to federal court. The procedure, contrary to *Rose*, does not call for dismissal of the petition, nor for dismissal of unexhausted issues and proceeding with the exhausted claims. The lower courts that have used the stay and abeyance procedure, therefore, have failed to carry out the clear mandate of this Court set out in *Rose*, *Castille*, *Coleman*, *O'Sullivan*, *Slack*, *Duncan*, and *Pliler*.

While Respondent agrees with Petitioner that the Eighth Circuit is alone in its (correct) view of "stay and abeyance," (Petitioner's Brief at 13-16) this has not deterred the Court from coming to the correct, contrary resolution on an issue in the past. *Rose*, 455 U.S. at 513 n.5 (noting that eight circuits did not enforce a total exhaustion requirement, while only two did so). This Court should have even less hesitancy in rejecting the rulings of the courts of appeals where they fail to follow the clear dictates of *Rose* when considered together with the statute of limitations.

The rationale for the total exhaustion requirement, as set out in these cases, is no less compelling now than it

has discretion to dismiss petition; dismissal upheld; petitioner had not established that he could not refile in federal court); *Calderon v. United States District Court*, 134 F.3d 981 (9th Cir. 1998) (stay and abeyance permitted *only* where district court first dismisses any unexhausted claims); *Mackall v. Angelone*, 131 F.3d 442 (4th Cir. 1997) (pre-AEDPA case), *contra*, *Rhines v. Weber*, 346 F.2d 799 (8th Cir. 2003), *cert. granted*, 124 S.Ct. 2905 (2004) (case at bar); *Akins v. Kenney*, 341 F.2d 681 (8th Cir. 2003) (stay and abeyance not allowed).

was when the cases were decided. The Court in *Rose* stated the purpose as follows:

> The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973). Under our federal system, the federal and state "courts [are] equally bound to guard and protect rights secured by the Constitution." *Ex parte Royall*, 117 U.S. [241], at 251 [(1886)]. Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass on the matter." *Darr v. Burford*, 339 U.S. 200, 204 (1950).

455 U.S. at 518. The Court stated further that "a rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error." *Id.* at 518-19. Finally, "to the extent that the exhaustion requirement reduces piecemeal litigation, both courts and the prisoner should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding." *Id.* at 520.

All of these goals are impeded if the district court could stay action on a petition rather than dismissing the petition or giving the petitioner a choice whether to proceed with the exhausted claims only. There is no encouragement to seek relief first from state courts, as petitioner may file a federal habeas petition (and have it retained and stayed) when there is a single exhausted issue. The procedure causes additional delay. Petitions can remain in federal court for years without further action. Under "stay and abeyance," the Court's "simple and clear instruction" (*Rose* at 520) "before you bring any claims in federal court, make sure that you have first taken each one to state court," ceases to govern federal habeas cases.

The cases Petitioner cites do not require a "stay and abeyance" procedure in federal court: *Slack*, 529 U.S. at 487, holds that a second petition (filed within the statute of limitations) is not barred as "second or subsequent" when there has been a failure to exhaust. It does not hold, as Petitioner argues, that "the exhaustion requirement controls *when* federal claims will be heard in § 2254 cases, not *whether* they will be heard." Petitioner's Brief at 11.

Petitioner places much stock in non-habeas, unrelated civil cases. Petitioner's Brief at 10-13. Citation of such cases is of limited utility in this habeas corpus case. Exhaustion of claims in some other court is not a problem common to most other civil cases.[2] Habeas corpus is

[2] In *Wilton v. Seven Falls Company*, 515 U.S. 277 (1995), eventual dismissal of the federal action was contemplated upon resolution of claims in state courts. Unlike habeas proceedings, the federal court would have had no power to reconsider the state court ruling, which would have been res judicata in the federal court. The Court made it clear that the discretionary stay was based on the language of the Declaratory Judgment Act. *Id.* at 285-87. The case was retained only to

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different; it has its own procedures and usages. *See Felker v. Turpin*, 518 U.S. 651, 663-64 (1996) (outlining separate history of habeas corpus holding that AEDPA provisions are not a "suspension of the writ" under U.S. Const. art. I, § 9, cl. 2). Habeas Rules, Rule 11 (Rules of Civil Procedure applicable only if not inconsistent with "these rules" or "any statutory provisions" [amendment effective December 1, 2004]).

Contrary to Petitioner's argument, moreover, the federal courts' "virtually unflagging obligation to exercise the jurisdiction given to them" under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817-18 (1976) is not relevant to the habeas exhaustion requirement or the habeas statute of limitations, except that it might require a district court to proceed to the merits on those claims that are exhausted. If the statute of limitations bars consideration of a case or claims (when considered with *Rose* and its progeny), then the merits of those claims are no longer matters over which the federal court must exercise jurisdiction. Moreover, none of the cases cited in Petitioner's Brief at last full paragraph of 11 and all of 12 are habeas cases. They thus are not in the unique field where there is a "rigorously enforced total exhaustion rule," *Rose*, 455 U.S. at 518, together with a statute of limitations specifically designed to "provide[] a powerful

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ensure that the case would be resolved if "the state case, for any reason, fail[ed] to resolve the matter in controversy." *Wilton*, 515 U.S. at 288 n.2. In *Deakins v. Monaghan*, 484 U.S. 193 (1988), the Court dealt with a *Younger v. Harris*, 401 U.S. 37 (1971) abstention issue where state criminal proceedings were pending, but there was no opportunity in state court to pursue a damages claim. There was no habeas exhaustion requirement and no prior case law requiring dismissal or deletion of claims.

incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts." *Duncan*, 533 U.S. at 180.

B. Congress, When it Enacted AEDPA, Retained the *Rose v. Lundy* Total Exhaustion Rule.

The requirements of *Rose* (*viz.*, the dismissal or elimination of unexhausted claims) are an important part of the foundation of AEDPA. In passing AEDPA, Congress did not weaken the statutory exhaustion requirement as it existed prior to AEDPA. The exhaustion requirement has existed since 1886, *Ex parte Royall*, 117 U.S. 241, 251 (1886), and was first codified in 1948, 28 U.S.C. § 2254 (1946 ed., Supp. III). *Rose* was decided in 1981 and consistently applied in subsequent cases. It must therefore be assumed that Congress was aware of the requirements of *Rose* and its progeny. *See Williams v. Taylor*, 529 U.S. 420, 434 (2000) ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in absence of specific direction to the contrary.").

The statements of sponsors of the legislation confirm Congress's intent to retain the exhaustion requirement, a requirement that included the interpretation in *Rose*. Senator Specter, one of the prime sponsors of what eventually became AEDPA, stated that "this bill does not abolish [the] exhaustion requirement. Unli[k]e the resolution of this issue in the 1990 legislation, which passed the senate, which eliminated the requirement of exhaustion of state remedies that provision is not in this bill." 141 Cong. Rec. S7803-01 at S7847 (daily ed. June 7, 1995). The

design and language of AEDPA, *Duncan*, 533 U.S. at 180, are thus consistent with retention of the *Rose* total exhaustion requirement. Accordingly, all of the reasons set forth in § II(A), *supra*, as to why the stay and abeyance procedure undermines the *Rose v. Lundy* total exhaustion rule and its objectives, retain their vitality post-AEDPA.

C. "Stay and Abeyance" Is Contrary to the Congressional Purpose Underlying the Statute of Limitations, as Construed in *Duncan v. Walker*.

One of the principal innovations of AEDPA was its imposition of a one-year statute of limitations on the filing of federal habeas corpus petitions. The stay and abeyance procedure is inconsistent with the limitations period in three interrelated respects. First, it undermines the policy underlying the limitations period, which is to expedite the habeas process. The stay and abeyance procedure slows the habeas process down considerably. Second, it is inconsistent with the provision tolling the limitations period during the pendency of a "properly filed application for State post-conviction or other collateral review." 28 U.S.C. § 2244(d)(2). The stay and abeyance procedure removes the incentive for habeas petitioners to exhaust all of their state claims before filing their federal petitions. Finally, stay and abeyance is inconsistent with this Court's holding in *Duncan v. Walker* that the tolling provision does not toll the limitations period while a mixed petition is pending in federal court. The stay and abeyance procedure was created expressly to undermine that result and provide for tolling during the period a mixed petition was pending in federal court.

1. The policy of AEDPA is plainly to expedite the habeas process. As this Court stated in *Woodford v. Garceau*, 538 U.S. 202, 206 (2003), "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases. . . ." *See also Duncan*, 533 U.S. at 179 (AEDPA has the purpose of "reduc[ing] the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review"); H.R. Conf. Rep. No. 104-518 at 111, 104th Cong., 2d Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 944; (Title 1 of AEDPA "incorporates reforms to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases").

The principal mechanism through which Congress addressed the concerns of delay was its enactment of the one-year statute of limitations, 28 U.S.C. § 2244(d)(1). All statutes of limitations limit the *time* within which a case may be brought and thereby limit the presentation of stale claims. This particular statute does so for the purpose of "reduc[ing] the potential for delay on the road to finality by restricting the time that a potential federal habeas petitioner has in which to seek federal habeas review." *Duncan*, 533 U.S. at 179. In this case, a capital case, Petitioner admits that he has an incentive to delay a final resolution. Petitioner's Brief at 27. There are other situations where a petitioner's claim improves with age, as witnesses or lawyers may die, records may be destroyed, or evidence may disappear.

The statute's goal of expediting the federal habeas process would be easily circumvented if the stay and abeyance procedure were upheld. That procedure permits

the presentation of a petition with one or a few exhausted claims, even if there are many unexhausted claims, and then the return to state court for a second (or third) round of attempted exhaustion. All the while, the federal habeas case might remain on the federal court's docket for years. That is not expediting the process as Congress intended. By contrast, if the total exhaustion rule of *Rose v. Lundy* continues to apply (rather than stay and abeyance), the habeas petitioner would be able to present a petition only within the one-year period after completing state direct appeal as appropriately stayed during any state post-conviction or other collateral proceedings. *Duncan*, 533 U.S. at 177-78. This is precisely what Congress sought to attain, and is consistent with this Court's *Rose* jurisprudence.

Petitioner is thus mistaken when he argues that "the exhaustion requirement controls *when* federal claims will be heard in § 2254 cases, not *whether* they will be heard." Petitioner's Brief at 11 (emphasis in original). While this may have been true prior to the statute of limitations, the statute, in conjunction with exhaustion doctrine, can and does limit Petitioner's ability to bring claims that have not been exhausted after an opportunity to do so. This is the natural and logical effect of retaining the total exhaustion requirement (not altered by 28 U.S.C. § 2254) while adopting a statute of limitations that does *not* provide for tolling of the statute during federal habeas proceedings. *Duncan*, 533 U.S. at 177-78.

The importance of preventing the limitations period from being subverted is heightened by changes to the Rules Governing § 2254 Cases. The limitations period is apparently a *replacement* for the doctrine of abuse of the writ embodied in Habeas Rules, Rule 9 (prior to December

1, 2004). Under the present Rule 9 (through November 30, 2004), delayed petitions may be dismissed if the state was prejudiced in its ability to respond to the petition by delay in its filing (Rule 9 prior to December 1, 2004).[3] The post-December 1, 2004 Rule 9 only refers to the successive petition rule of 28 U.S.C. § 2244(b)(3) and (4). The State and the courts are thus without tools to address the situation of a prejudicial delay, except the AEDPA statute of limitations. If Petitioner's interpretation of *Rose* and 28 U.S.C. § 2244(d) is adopted, stay and abeyance allows for any length stay the district court will grant. There is no statutory rule, or other limit to take account of situations where a lawyer or witness has died, evidence or records have been lost because of passage of time, or where a petitioner has intentionally delayed in order to enhance his claims or postpone his day of reckoning. If "stay and abeyance" is allowed, the statute does not effectively limit the time required for habeas adjudication. With repeal of Rule 9, however, it *must* do so if there is to be any limit on abusive filings.

2. In addition to retaining the total exhaustion requirement of *Rose v. Lundy*, AEDPA encourages filing

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[3] The State realizes that the present Rule 9 remains in effect as of the date of this brief. Unless its effectiveness is delayed by Congress, however, it will cease to be the law as of December 1, 2004, before this case is argued or decided. *See* 28 U.S.C. §§ 2072, 2074, 2075. The court's Order of April 26, 2004, provides, in part, as follows:

> [T]he foregoing amendments to the ... Rules Governing Section 2254 Cases in the United States District Courts ... shall take effect on December 1, 2004, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

Order of April 26, 2004, authorizing transmission of rules to Congress.

fully exhausted federal habeas petitions by tolling the limitations period during the pendency of state proceedings. 28 U.S.C. § 2244(d)(2) (tolling the limitations period during the pendency of a "properly filed application for State post-conviction or other collateral review"). This Court stated in *Duncan* that

> Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible. [533 U.S. at 181]

The stay and abeyance procedure is out of step with this "design" and would result in "diminution of statutory incentives to proceed first in state court" at "the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.* at 180. As discussed in § II(A), *supra*, the stay and abeyance procedure removes the principal consequences that *Rose* – and AEDPA – sought to impose on habeas petitioners who fail to exhaust all state remedies before proceeding to federal court.

3. Finally, a stay and abeyance procedure specifically undermines the holding of *Duncan*, which construed the limitation period's tolling provision. *Duncan* specifically held that the time within which a habeas petition may be brought is not tolled by the filing of a federal habeas petition. *Id.* at 180-81. The Court found that Congress, by the language of the statute it adopted, intended that the time of the limitation period was not tolled during a filing in federal court. A stay and abeyance procedure nullifies the construction of § 2244(d)(2) adopted in *Duncan* by tolling the statute (that is not allowing it to run) because there has been a filing in *federal* court. Petitioner would, if

stay and abeyance applies, have accomplished directly what *Duncan* prohibits: He would have stopped the running of the statute against him by filing in *federal* court.

Whatever the intent or motivation of Petitioner, or the good faith of Petitioner or the courts, stay and abeyance, in reality, leads to delay beyond that envisioned by Congress. Stay and abeyance is incompatible with and destructive of this Court's ruling in *Rose* and of the AEDPA limitation period. Open-ended stays to allow exhaustion serve no purpose other than neutralizing the statute. They also neutralize *Duncan* by allowing a federal filing to "stay" (or toll) the statute. If Congress had intended an unlimited time within which to exhaust state remedies, it would not have adopted a statute of limitations. In practical effect, there is nothing except *Rose's* complete exhaustion requirement that will encourage the filing of fully exhausted petitions, encourage early exhaustion, discourage delay tactics, and enforce the one-year statute of limitations. The only purpose of a stay and abeyance procedure is to thwart these goals, the congressional intent, and this Court's holdings in *Rose* and *Duncan*.

III. APPROPRIATE FEDERAL REVIEW REMAINS AVAILABLE WITHOUT "STAY AND ABEYANCE."

A. Federal Review Remains Available to Habeas Petitioners Under a Complete Exhaustion Requirement.

The State's interpretation of *Rose* and 28 U.S.C. § 2244(d) does not deprive Petitioner of federal habeas review. Rather, Petitioner potentially loses only those issues that he has failed to exhaust in the state courts.

Petitioner in this action had a total of thirty-five claims. Of those, the district court found eight unexhausted, leaving Petitioner with twenty-seven claims he may assert under the State's argument. Petitioner's Brief at 27. Those issues that are already exhausted remain for decision by the federal habeas court, even where *Rose* and AEDPA are fully implemented. *Rose*, 455 U.S. at 520-21.

This Court's statement of the purpose of the exhaustion requirement (*Rose*, 455 U.S. at 520) remains relevant.

> [S]trict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. . . . for as a result the district court will be more likely to review all of the petitioner's claims in a single proceeding, thus providing for a more focused and thorough review.

Petitioner turns this requirement on its head by advocating a rule that allows filing a mixed petition with a single exhausted claim rather than a single, fully exhausted petition. Petitioner's proposed rule, including "stay and abeyance," permits and encourages premature filing of mixed petitions before any serious attempt is made at exhausting *all* state remedies.

Habeas petitioners need not fear the statute of limitations where they continue to pursue state remedies within a reasonable time. As *Duncan* makes plain, any time during which there is a pending post-conviction petition before the state courts is excluded from the statute. There is no reason why any habeas petitioner should fail or refuse to pursue state court remedies (or, for that matter, why the petitioner should stop any attempts to exhaust).

The statute of limitations and *Duncan* make exhaustion of state remedies at the earliest possible date, and continuing pursuit of state remedies, imperative. If a petitioner delays asking for habeas relief on an issue in state court, but later requests that relief, he might run afoul of the statute of limitations under *Duncan*. Under the plurality of *Rose*, however, such a petitioner still is permitted to assert any claims in federal court that have been exhausted in state court. 455 U.S. at 520-21.

Rose, *Duncan*, and 28 U.S.C. § 2244(d) do not deprive petitioners of federal habeas review. Dismissal is not the only course of action in the district court under the Eighth Circuit holding. Rather, the Eighth Circuit remanded to the district court for the purpose of considering whether Petitioner would "elect[] to forego further state court proceedings, in which case he would presumably proceed on all claims in the federal habeas action and contest any argument by Respondent that the unexhausted claims are procedurally barred." *Rhines* (JA 146). The court stated further,

> *Akins* [versus *Kenney*, 341 F.3d 681 (8th Cir. 2003)] precludes the district court from staying Rhine's exhausted claims while he seeks state post-conviction relief on other claims that may be unexhausted. However, *Akins* did not decide whether a petitioner may delete unexhausted claims while proceeding only on the claims he believes are fully exhausted.

Id.

Respondent agrees with the Eighth Circuit remand. It is consistent with the plurality statement in *Rose*, 455 U.S. at 520: "A total exhaustion rule will not impair that

interest [in obtaining speedy relief] since he [petitioner] can always amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims." The *Rose* Court stated that doing so might not be to petitioner's advantage, since upon returning to federal court, the district court may find that assertion of the newly exhausted claims may constitute an abuse of the writ.[4] *Id.* at 521 (citing *Sanders v. United States*, 373 U.S. 1 (1963)).

Where a stay and abeyance procedure is not allowed, and the Eighth Circuit position governs, Petitioner will be able to assert those issues he has exhausted when he brings his federal petition. A petitioner will further be able to assert any other issues that are exhausted before running of the federal statute of limitations, recognizing that the statute does not run while petitioner continues to pursue state court remedies. *Duncan*. Of course, Petitioner could potentially lose those issues that are not exhausted until after the running of 28 U.S.C. § 2244(d), if there is a time period when petitioner had a federal habeas action pending but no state action pending. That is the case here. Petitioner's Brief at 4, 23. Approximately two and one-half years ran while the federal petition was pending, and no state petition was on file. *Rhines v. Weber* (JA 292), decided February 9, 2000; second state habeas filed August 5, 2002 (Notice of Filing, district court docket No. 21). As Petitioner further points out, however (Petitioner's Brief at 27), Petitioner made approximately thirty-five individual claims. Petitioner alleged four of these were unexhausted, Respondent asserted that twelve were

[4] Under the repeal of Habeas Rule 9, the statute of limitations apparently substitutes for abuse of the writ doctrine.

unexhausted, and the district court found a total of eight unexhausted. JA 128-33. Petitioner is not, therefore, deprived of all federal review. Only those issues that were not brought to the attention of the state courts in spite of opportunities to do so are potentially lost.[5]

B. Loss of Claims Where They Have Not Been Expeditiously Pursued in State Courts Is the Normal Result of the Statute of Limitations.

Petitioner's argument that stay and abeyance must be instituted so that he will have a practically unlimited opportunity to bring new claims runs afoul of the statute of limitations. Petitioner, of course, complains that "a dismissal deprives prisoners of the right to have a federal court consider a timely filed § 2254 petition on its merits if the petitioner had the misfortune of having his one-year AEDPA limitations period elapse before the district court determined the petition to be mixed." Petitioner's Brief at 20. There are several answers to this contention. First, there is no reason under AEDPA why Petitioner should not pursue any arguable state remedies prior to filing in

[5] Petitioner's contentions to the contrary notwithstanding (Petitioner's Brief at 30-31), the State does not believe that a habeas petitioner is entitled to present all claims he may have, no matter when he first asserts them in state court. *Slack* does not so hold but holds only that a second petition may be brought where the first was dismissed for failure to exhaust, and the new petition is not outside the statute of limitations. Habeas is subject to all the provisions of AEDPA, which are not a suspension of the writ, *Felker*, 518 U.S. 651, 664 (1996). The quote from *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (Petitioner's Brief at 31) also does not govern as Respondent is not asking for outright dismissal and the Eighth Circuit did not require such dismissal.

federal court, or even while a federal petition is pending. Petitioner in the case at bar admitted that his petition was mixed when he had approximately three months left to file a second state petition. JA 44, 55, 58, 60 (Amended Petition filed November 20, 2000; statute expired at earliest in February 2001). This is exactly what *Rose* contemplates. If such remedies are being pursued, then the statute of limitations is automatically tolled. 28 U.S.C. § 2244(d)(2); *Duncan*.

Second, Petitioner does not even potentially lose his right to have exhausted issues determined by the federal court, so long as the petition containing them is filed prior to the one-year period of limitations expiring. The mixed petition may thus be considered on its merits, although perhaps with fewer issues. Third, as long as state remedies are being pursued, there is no need to have a federal court case pending, *unless* the statute has already expired. If the statute has already expired, then the district court, in dismissing or requiring the deletion of unexhausted claims, is following 28 U.S.C. § 2244(d), *Rose* and *Duncan*. This is natural and necessary if the statute is to serve the purpose of promoting "the well-recognized interest in the finality of state court judgments." *Duncan*, 533 U.S. at 179.[6]

[6] Petitioner argues that if the stay and abeyance procedure is not approved, then this Court should equitably toll the statute of limitations for this Petitioner. Petitioner's Brief at 23 n.5. Equitable tolling is inappropriate under this statute. This Court has determined that where a statute of limitations contains its own tolling provisions, equitable tolling is not available. *United States v. Beggerly*, 524 U.S. 48-49 (1998). AEDPA contains a provision that postpones the running of the one-year limitation for the filing of a petition for habeas corpus to "the date on which the factual predicate of the claim or claims presented could have been discovered through exercise of due diligence." Congress has also provided two other situations in which the period may be enlarged

(Continued on following page)

Petitioner also contends that the exhaustion requirement is so difficult to understand that no petitioner, lawyer, or judge can accurately predict or determine exhaustion. This contention is backed by citation to statistics from dissenting opinions in *Pliler* and *Duncan*. Petitioner's Brief at 25-26. Such a contention was firmly rejected in *Rose*, 455 U.S. at 520:

> There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions (STEVENS, J. *post*. at 550), or will serve to "trap the unwary pro se prisoner." (BLACKMUN, J., *post*. at 530). On the contrary, our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you have first taken each one to state court.

This Court has held that all a petitioner needs to do is "fairly present" the same claim to the state courts as he presents in federal court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). This includes presenting to state courts both the facts and law presented to the federal court. *Id.* at 277-78. While Petitioner needs to raise the same claim, or present "the substance of a federal habeas corpus claim" (*id.* at 278), to the state court, he does not need to "cit[e] book and verse on the federal constitution" (*id.* at 278). This is not an impossibly difficult task in any case, as *Rose*

based on the equities of the situation. 28 U.S.C. § 2244(d)(1)(B), (C), (2). Finally, Petitioner is not one who "belatedly" realized his petition was unexhausted, *Duncan*, 533 U.S. at 184 (Stevens, J., concurring). He knew of failure to exhaust approximately three months before the statute ran. JA 60, 292. The State never assured him that he could file unexhausted claims *ad infinitum*. He was not "affirmatively misled." *Pliler*, 124 S.Ct. at 2448 (O'Connor, J., concurring).

clearly recognized. In the case at bar, Petitioner knew, approximately three months before the statute ran, that he had a mixed petition. JA 58, 60, 292.

CONCLUSION

Stay and abeyance is not an appropriate vehicle to be employed as a weapon against *Rose*, *Duncan* and the habeas statute of limitations. Respondent therefore requests that this Court affirm the holding of the Eighth Circuit prohibiting its use.

Respectfully submitted,

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In The

Supreme Court of the United States

CHARLES RUSSELL RHINES,

Petitioner,

v.

DOUGLAS WEBER, WARDEN,
SOUTH DAKOTA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Capital Case

Can a federal court stay, or must it dismiss, a 28 U.S.C. 2254 Petition for Habeas Corpus that includes exhausted and unexhausted claims when the stay is necessary to permit the Petitioner to exhaust claims in state court without having his federal petition barred by the one-year statute of limitations in the Antiterrorism and Effective Death Penalty Act?

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REPLY ARGUMENT

The core issue for resolution in this case is how best to administer the "total exhaustion" rule of *Rose v. Lundy*, 455 U.S. 519 (1982), in light of 28 U.S.C. § 2244(d) and *Duncan v. Walker*, 533 U.S. 167 (2001), neither of which existed when *Rose* was decided. The Brief of Respondent on the Merits (hereinafter "State's brief") mischaracterizes the stay-and-abeyance procedure and grossly overstates the procedure's impact on habeas corpus proceedings. The State's brief ultimately advocates a punitive rule never contemplated in *Rose*, *Duncan* or the AEDPA of complete forfeiture of either federal habeas review or unexhausted claims. The State's proposed rule runs contrary to the writings of justices of this Court that have addressed the issue and every court of appeals (other than the Eighth Circuit) that has decided the issue.

I. STAY-AND-ABEYANCE IS CONSISTENT WITH ROSE.

A. Stay and abeyance serves the underlying principles of *Rose*.

In opposing the use of a stay-and-abeyance procedure in federal habeas cases, the State makes two interrelated contentions: (a) that stay-and-abeyance "seeks not only to eviscerate the statute of limitations, but also to undermine the total exhaustion rule of *Rose*," and (b) that this purported evisceration of *Rose* occurs because stay-and-abeyance radically departs from *Rose* and introduces opportunities for delay and piecemeal litigation that did not exist before. *State's Brief* at 14, 23-25. Neither of these contentions is accurate.

First, nothing petitioner Rhines has done in the lower courts or argued to this Court can fairly be described as advocating evisceration of the limitations period or elimination of the exhaustion requirement. Rhines was more diligent than most in getting to federal court, by filing his petition when "fewer than three weeks had run on the one-year limitations period." *State's Brief* at p. 8; J.A. 33. Additionally, Rhines sought and obtained the stay-and-abeyance order from the district court not as a means of somehow dodging his exhaustion obligations, but for the express purpose of fully complying with them, just as *Rose* requires. Rhines then filed a state court petition within the 60 day period allotted by the district court. J.A. 139-144. Thus, Rhines' conduct in the lower courts gives no indication that he is pursuing the agenda ascribed to him by the State's brief.

Second, and more importantly, stay-and-abeyance procedure entails nothing approaching the sort of radical departure from *Rose* about which the State warns but never describes in detail. In fact, with one exception, the stay-and-abeyance procedure employed by the district court in this case follows precisely the course taken by lower federal courts since *Rose* was decided, and does so for precisely the same reason: facilitation of "total exhaustion." The lone exception – made necessary by 2244(d) and *Duncan*, neither of which were foreseen in 1982 – is that stay-and-abeyance involves the administrative suspension of habeas proceedings, rather than the dismissal without prejudice of those proceedings. In every other way, stay-and-abeyance and strict application of *Rose* are identical. In each, a mixed petition is not permitted to proceed to adjudication; in each, the prisoner is instead afforded the option of returning to state court to exhaust remaining

remedies; and in each the prisoner is rightly spared the unnecessarily punitive forfeiture of federal review of his unexhausted claims when he commits the procedural offense of filing a mixed petition.[1]

The total exhaustion principle of *Rose* is not jurisdictional. *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Strickland v. Washington*, 466 U.S. 668, 679 (1984); *see* 28 U.S.C. § 2254(b)(1). Rather, the exhaustion principle as applied in *Rose* is based on comity considerations that "one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant on the litigation, have had an opportunity to pass on the matter." *Rose*, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)). Stay-and-abeyance, particularly when conditioned on a requirement as here that a Petitioner return within sixty days to exhaust claims in state court, serves comity interests and rigorously enforces the exhaustion requirement. Indeed, a stay is the proper way for a district court to "defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent power . . . pass upon the matter." *Rose*, 455 U.S. at 518; *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 278 (1995); *Deakins v. Monaghan*, 484 U.S. 193, 202 (1988); *see also Lambrix v. Singletary*, 520 U.S. 518, 521, 524 (1997) (taking notice without disapproval of a federal court's use of abeyance procedure).

---

[1] The State's suggestion that ascertaining the exhaustion status of federal habeas claims is an endeavor devoid of complexity or nuance, *see State's Brief* at 33, is belied by this very case. As the State itself explains: "The State contended there were twelve unexhausted issues; Petitioner stipulated four were unexhausted; and the court found four additional issues unexhausted." *State's Brief* at 8-9; J.A. 128-133.

B. Even the State agrees that *Rose* does not mandate dismissal of Rhines' Petition.

Despite opposing stay-and-abeyance, the State acknowledges that *Rose* does not mandate dismissal of Rhines' federal habeas corpus petition. "The State . . . does not argue that the entire case must be dismissed, *unless* Petitioner refuses to dismiss unexhausted claims." *State's Brief* at p. 10 (emphasis in original); *see also State's Brief* at p. 12 ("Petitioner is not presently in danger of having his case dismissed. . . . Petitioner is thus in no danger of losing all federal remedies, although he may be in danger of losing some issues that have not been previously exhausted.").[2]

The State must concede that *Rose* does not require dismissal of Rhines' petition because *Rose*, after all, adopted the total exhaustion rule expressly to "leav[e] the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Rose*, 455 U.S. at 510.[3] After *Duncan*, the

[2] The State also rewrites the question presented as being "whether a federal court must, under *Rose v. Lundy*, 455 U.S. 509 (1982) and *Duncan v. Walker*, 533 U.S. 167 (2001), dismiss a habeas corpus petition containing both exhausted and unexhausted issues (a "mixed petition"), *unless the Petitioner dismisses the unexhausted issues*." *State's Brief* at p. 4 (emphasis added); *see also State's Brief* at i (stating the question presented in a way that presumes that "the state prisoner may now pursue all of his exhausted claims in federal court").

[3] *Rose* made clear that the total exhaustion rule was to promote comity without "unreasonably impair[ing] the prisoner's right to relief." *Rose*, 455 U.S. at 522. The plurality in *Rose* reinforced that it was the petitioner who had the option "to amend the petition to delete the unexhausted claims, rather than returning to state court to exhaust all of his claims." *Id.* at 521 (plurality opinion).

only way to preserve that choice to a prisoner like Rhines is through stay-and-abeyance. There is nothing in the AEDPA or in *Duncan* that suggests that Congress or this Court intended to take that choice away from a petitioner like Rhines.

II. STAY-AND-ABEYANCE IS NOT INCONSISTENT WITH AEDPA OR *DUNCAN*.

Congress in 28 U.S.C. § 2254(b) provided:

> (1) An application for Writ of Habeas Corpus on behalf of a person in custody pursuant to the judgment of a State court *shall not be granted* unless it appears that –
>
> (A) The applicant has exhausted the remedies available in the courts of the State
>
> . . .

28 U.S.C § 2254(b) (emphasis supplied).

Congress did *not* provide that a mixed petition shall not be filed, cannot be held in abeyance, or shall be dismissed, or that the federal court shall have no jurisdiction over a mixed petition.[4] The wide acceptability of stay-and-abeyance in the

[4] Congress in the AEDPA loosened the exhaustion rule by providing in § 2254(b)(2): "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(2). As Justice Stevens has written, there is "every reason" to invoke stay and abeyance "when AEDPA gives a district court the alternative of simply denying a petition containing unexhausted but nonmeritorious claims, see 28 U.S.C. § 2254(b)(2) (1994 ed., Supp. V), and when the failure to retain jurisdiction would foreclose federal review of a meritorious claim because of the lapse of AEDPA's 1 year limitations period." *Duncan v. Walker*, 533 U.S. 167, 183 (2001) (Stevens, J., concurring).

courts of appeals signals that the procedure is not inconsistent with the AEDPA or with *Rose*.[5]

Stay-and-abeyance does not supplant the tolling provision of the AEDPA's one year statute of limitations; rather, stay-and-abeyance only applies when a petitioner, such as Rhines here, has met the responsibility of timely filing within the one year AEDPA limitation period. Indeed, it would be wholly inconsistent with the AEDPA one year statute of limitations to bar claims filed by a petitioner like Rhines. Rhines, by the State's own admission, filed his federal habeas corpus petition when only eight to fourteen days had run in his one year period. J.A. 33, *see State's Brief* at p. 8. After Rhines filed his Motion to Toll Time to the district court, the State responded that the motion was unnecessary because "Petitioner is in no danger of losing his right to file for federal habeas corpus relief" due to his timely AEDPA filing. J.A. 33. The district court, on the State's request, denied Rhines' Motion to Toll Time as "unnecessary." J.A 35. Under those circumstances, Rhines satisfied the AEDPA's one year statute of

[5] In Petitioner's Brief on the Merits, Petitioner Rhines cited thirteen decisions from courts of appeals requiring or allowing stay-and-abeyance, including those in the first, second, third, fourth, fifth, sixth, seventh, ninth, and eleventh circuits. *Petitioner's Brief on the Merits* at pp. 13-14. Additional court of appeals' decisions approving of stay-and-abeyance or similar procedures also include *Griffin v. Rogers*, 308 F.3d 647, 651-52 (6th Cir. 2002); *Newell v. Hanks*, 283 F.3d 827, 834 (7th Cir. 2002); *Anthony v. Cambra*, 236 F.3d 568, 574 (9th Cir. 2000); *Calderon v. United States District Court*, 134 F.3d 981, 986-87 (9th Cir. 1998). The United States Court of Appeals for the Eighth Circuit remains the lone court of appeals that has considered the issue and that has declined to approve of stay-and-abeyance. *Rhines v. Weber*, 346 F.3d 799 (8th Cir. 2003), *cert. granted*, 124 S.Ct. 2905 (2004); *Akins v. Kenney*, 341 F.3d 681 (8th Cir. 2003).

limitation, and there is no reason why stay-and-abeyance under such circumstances is inconsistent with the AEDPA tolling provision or *Duncan*.

The State's suggestion that suspending the running of the limitations period for time spent exhausting state court remedies is inconsistent with Congress' desire to "expedite the habeas process," *State's Brief* at 23, is itself at odds with § 2244(d)(2). Congress in § 2244(d)(2) expressly authorized tolling of the limitations period as a means of furthering the exhaustion requirement, *see Duncan*, 533 U.S. at 178, and did so without regard to whether the state court exhaustion litigation takes the form of a first, second, or subsequent application, so long as it is "properly filed." The class of habeas petitioners affected by the Court's decision in this case are those petitioners presenting claims for which a state remedy actually remains available,[6] as opposed to those petitioners whose claims were not fairly presented to the state courts but are nevertheless technically exhausted due to a procedural bar from state court review. The group of habeas petitioners affected by this Court's ruling therefore could have properly filed applications for state court relief, and in so doing secure the tolling available via § 2244(d)(2).

The State mistakenly asserts that stay-and-abeyance "is a procedure manufactured by lower federal courts to neutralize *Duncan's* holding," *State's Brief* at 12, when, in actuality, the stay-and-abeyance procedure originates from the inherent authority of courts to issue stays and is

[6] In Rhines' case, South Dakota allows a second state habeas action under certain circumstances where there has been ineffective assistance of habeas counsel appointed by the state court in the first habeas corpus case. *Jackson v. Weber*, 637 N.W.2d 19, 22-24 (S.D. 2001).

endorsed in concurring opinions of two justices who formed part of the majority in *Duncan*. Justice Souter, joining the Court's opinion "in full" in *Duncan*, pointed out in his concurrence "that nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies." *Id.* at 182 (Souter, J., concurring). Justice Stevens, in his concurrence in *Duncan*, wrote that "in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." *Id.* at 182-83 (Stevens, J., concurring). The only justices who reached the issue of stay-and-abeyance in *Duncan* approved of the procedure. Stay-and-abeyance is not inconsistent with *Duncan*.

III. THE STATE HAS MISCHARACTERIZED STAY AND ABEYANCE AND ITS EFFECTS.

The State's main practical attack on stay-and-abeyance is that it will create delay. *State's Brief* at 23, 25, 27. The State labors under the misapprehension that prisoners who, rightly or wrongly, believe themselves entitled to habeas corpus relief would favor delay. As this Court has noted, a "prisoner's principal interest, of course, is in obtaining speedy federal relief on his claims." *Rose*, 455 U.S. at 520 (plurality decision); *see also Pliler v. Ford*, 124 S.Ct. 2441, 2446 (2004) ("It is certainly the case that not every litigant seeks to maximize judicial process").

The State's concern about delay is illusory. Because stay-and-abeyance does nothing more than to afford a habeas petitioner the same opportunity to exhaust previously unexhausted claims that has been available under *Rose*, the State's predictions of interminable delays and

evisceration of §2244(d)'s limitations period are inaccurate. Any delays occasioned by stay-and-abeyance are no different from the delays inherent in a dismissal without prejudice under *Rose*. Under either procedure, the federal proceedings stop to permit the state exhaustion proceedings to run their course.

Moreover, the stay-and-abeyance rules that have developed outside the Eighth Circuit effectively preempt abusive delays by empowering district courts to set and enforce deadlines for initiating state court exhaustion proceedings and returning to federal court once those proceedings are concluded.[7] Indeed, the district court in this case gave Rhines sixty days within which to file his state court habeas petition, and Rhines complied with this order. J.A. 136, 139-144. The State's Brief neither acknowledges this important feature of stay-and-abeyance procedure, nor offers any evidence as to how it might be insufficient to curb unreasonable exhaustion-related delays.

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[7] *See, e.g., Crews v. Horn*, 360 F.3d 146, 154 (3rd Cir. 2004); *Hill v. Anderson*, 300 F.3d 679, 682 (6th Cir. 2002) (instructing district court to condition stay on petitioner's seeking state court relief within ninety days); *Kelly v. Small*, 315 F.3d 1063, 1069-1071 (9th Cir. 2002), *cert. denied*, 538 U.S. 1042 (2003) (following *Zarvela v. Artuz*, *infra*, and finding thirty days ample time for petitioner to return to state court); *Zarvela v. Artuz*, 254 F.3d 374 (2nd Cir. 2001) (amended op.) (district court should condition stay on petitioner's returning to state court within thirty days and returning to federal court within thirty days after exhaustion); *Garraway v. Phillips*, 2004 WL 1088097 (S.D.N.Y. May 14, 2004) (applying *Zarvela*, staying petition conditioned on petitioner returning to state court within thirty days); *Faraci v. Grace*, 331 F.Supp.2d 362 (E.D.Pa. Aug. 16, 2004) (requiring petitioner to return to state court within thirty days to take advantage of the stay).

In asserting that permitting stay-and-abeyance will somehow encourage prisoners to bypass state court and file directly in federal court, the State likewise fails to acknowledge AEDPA's modification of 28 U.S.C. § 2254(b)(2), which permits district courts to deny unexhausted habeas claims on their merits. Given the possibility of outright dismissal with prejudice, it is unlikely that many rational prisoners will view the submission of wholly unexhausted federal habeas petitions as a worthwhile gamble, especially when they stand to gain nothing more than what is available to them through the proper filing of an application for state post-conviction relief. *See* § 2244(d)(2).

With the State's mischaracterizations and overstatements about the operation and effect of stay-and-abeyance procedure fully exposed, it becomes clear that the State is not actually advocating a *defense* of *Rose* or the exhaustion requirement against *erosion* by stay-and-abeyance procedure. Rather, the State is pursuing the *creation* of an unprecedented, one-way turnstile that would prevent prisoners, once in federal court, from returning to state court for any reason without forfeiting the right to federal review. *See State's Brief* at 23-24. Such a rule would be far beyond *Rose*, which has always been understood to permit dismissal for the purpose of pursuing available state court remedies, then returning to federal court. *See Rose*, 455 U.S. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)) ("federal courts apply the doctrine of comity, which 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter'"); *see also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 (1992) ("purpose of exhaustion is not to create a

procedural hurdle on the path to federal habeas court, but to channel claims into an appropriate forum"). The State's proposed rule is far less about protecting the exhaustion requirement against attack by delay-minded habeas petitioners than it is about creating a penalty for filing a mixed petition – complete forfeiture of either unexhausted claims or federal habeas review – that is grossly disproportionate to the offense.[8] If anything is fundamentally incompatible with *Rose*, this is it.

It is important to place the State's predictions of delay, disruption and evisceration of the federal limitations period in proper context. While the submission of mixed petitions is a relatively common occurrence in the federal district courts, the proportion of those cases in which stay-and-abeyance, if approved by this Court, will be a realistic option is quite small. This is so because, in the vast majority of cases, there is no remaining state court remedy available to the petitioner by the time he arrives in federal court, either because the state limitations period has expired,[9] or the relevant state rules prevent the filing of a

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[8] If the State's rule were adopted, a petitioner who, through no fault of his own, discovers a winning claim while in federal court would have no means of exhausting an available state remedy for that claim without simultaneously forfeiting the ability ever to seek federal habeas relief, in the event the state court improperly rejected the new claim. Such a rule is unnecessarily rigid, and serves no legitimate purpose.

[9] *See, e.g.*, Ala. R. Crim. P. 32.2(c) (jurisdictional one-year limitations period triggered by issuance of certificate of judgment by Court of Criminal Appeals or expiration of time in which direct appeal could have been filed); Ariz. Crim. P. Rule 32.4(c) (in capital cases, application must be filed within 120 days of notice of post-conviction relief; 60 day extension available for good cause); Ark. R. Crim. P. 37.2(c) (application for post-conviction relief in non-capital case must be filed within 90 days of entry of judgment or 60 days of issuance of appellate mandate); Ark. R. Crim. P. 37.5(b) and (e) (application for post-conviction relief in

(Continued on following page)

capital case must be filed within 118 days of issuance of mandate following affirmance on direct appeal); Fla. R. Crim. P. 3.851 ("Any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final"); Ga. Code Ann. §9-14-42 (four year limitations period for seeking post-conviction relief in non-capital felony cases); Idaho Code §19-2719 (legal or factual challenges to death sentence must be filed within 42 days of judgment imposing sentence); Illinois Code §122-1(c) (subject to limited exceptions, petitions for post-conviction relief must be filed within six months of finality on direct appeal or, where no appeal is taken, within three years of date of conviction); Ky R. Crim. P. 11.42(10) (application for post-conviction relief must be filed within three years after judgment becomes final subject to limited exceptions for newly discovered evidence or retroactive new rules); La. Code Crim. Proc. Ann. art. 930.8 (two year limitations period for non-capital cases); Mo. R. Crim. P. 29.15(b) (motion for post-conviction relief must be filed within 90 days of issuance of mandate on direct appeal or, where no appeal is taken, within 180 days of prisoner's delivery to custody); Mont. Code Ann. §46-21-102 (one year limitations period with exception for newly discovered evidence establishing innocence); N.C. Gen. Stat. §15A-1415(a) (120 day limitations period for capital cases, triggered by finality on direct review or appointment of post-conviction counsel); Ohio Rev. Code Ann. §2953.21(A)(2) (petition for post-conviction relief must be filed within 180 days of delivery of trial transcript to appellate court or, if no appeal taken, within 180 days after expiration for time to appeal); Okla. Stat. tit. 22, §1089D.1 (in capital cases, motion for post-conviction relief must be filed within 90 days of filing of initial or reply brief on direct appeal); Pa. Cons. Stat. Ann. §9545(b) (subject to limited exceptions, any petition for post-conviction relief, including a second or successive petition, must be filed within one year of date on which conviction becomes final; any claim brought under an exception must be filed within 60 days of date on which claim became available); Tenn. Code Ann. §40-30-102(a) and (b) (one year jurisdictional limitations period, subject to exceptions for new retroactive rules, actual innocence, or invalidation of prior conviction used to enhance current sentence, running from date of final action by state court on direct appeal or, if no appeal is taken, date judgment became final); Tex. Code Crim. Proc. art. 11.071 §4(a) (in capital cases, absent showing of cause, application for state habeas relief "must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel . . . or not later than the 45th day after the date the state's original brief is filed on direct appeal . . . whichever date is later"); Va. Code Ann.

(Continued on following page)

second application for post-conviction relief.[10] In these

§ 8.01-654.1 (in capital cases involving indigent prisoners, state habeas petition must be filed within 120 days of appointment of counsel); Va. Code Ann. § 8.01-654(A)(2) (in non-capital cases, state habeas petition "shall be filed within two years from the date of final judgment in the trial court or within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later").

[10] *See, e.g.*, Ala. R. Crim. P. 32.2(b) (successive application for post-conviction relief on grounds not previously raised must be denied absent jurisdictional defect in original trial, or showing of cause and miscarriage of justice); Ariz. Crim. P. Rule 32.2 (successive applications for post-conviction relief prohibited absent satisfaction of limited exceptions); Ark. R. Crim. P. 37.2(b) (grounds for post-conviction relief not raised in initial application for post-conviction relief "may not be the basis for a subsequent petition" absent showing that they were not "intelligently and understandingly waived"); *In re Robbins*, 18 Cal.4th 770, 780-781 (1998) (California petitioner must establish absence of, or good cause for, substantial delay to secure review of second or successive claim for post-conviction relief); Ga. Code Ann. §9-14-51 (second or subsequent petition for state habeas corpus relief barred absent finding that "grounds for relief asserted therein . . . could not reasonably have been raised in the original or amended petition"); Idaho Code §19-2719(5)(a) (successive petitions for post-conviction relief barred absent satisfaction of strict requirements); Illinois Code §122-1(f) (successive petitions for post-conviction relief barred absent showing of cause and prejudice); *McQueen v. Commonwealth*, 949 S.W.2d 70 (Ky. 1997) (issues which were or could have been raised in a first application for post-conviction relief may not be presented in a successive application); La. Code Crim. Proc. Ann. art. 930.4 (barring repetitive petitions absent satisfaction of limited exceptions); Miss. Code Ann. §99-39-27(9) (barring second or successive applications for post-conviction relief absent showing of intervening new law or newly discovered evidence); Mo. R. Crim. P. 29.15(1) ("The circuit court shall not entertain successive motions [for post-conviction relief]"); Mont. Code Ann. §46-21-105(b) (barring successive applications for post-conviction relief absent showing that grounds could not reasonably have been raised in first application); N.C. Gen. Stat. §15A-1419 (barring successive motions for appropriate relief absent satisfaction of limited exceptions); Ohio Rev. Code Ann. §2953.23 (barring second or successive petitions for post-conviction relief absent showing of both cause and actual innocence of offense or, in capital cases, eligibility for death sentence); Okla. Stat. tit.

(Continued on following page)

cases, any claims not previously presented to the state courts provide no occasion for stay-and-abeyance; rather, such claims are simply deemed to be procedurally defaulted, and either denied on that basis, or considered on their merits after a showing of "cause and prejudice" or "miscarriage of justice." *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

In the small percentage of cases in which a state court is actually willing to entertain a second or subsequent application for post-conviction relief by a prisoner who has already moved on to federal court, there is no compelling federal interest in obstructing access to that review. The State repeatedly invokes the importance of the total exhaustion rule and the limitations period, but fails to acknowledge that both exist not to further federal courts' interest in the speedy disposition of habeas cases, but to further the states' interest in comity, federalism and finality. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 179 (2001) ("The 1-year limitation period of § 2244(d)(1) quite

22, §1089D.2. ("All grounds for relief that were available to the applicant before the last date on which an application could be timely filed not included in a timely application shall be deemed waived"); Tenn. Code Ann. §40-30-102(c) ("In no event may more than one (1) petition for post-conviction relief be filed attacking a single judgment. If a prior petition has been filed which was resolved on the merits by a court of competent jurisdiction, any second or subsequent petition shall be summarily dismissed"); Tex. Code Crim. Proc. art. 11.071 §5 (in capital cases, second or subsequent application for state habeas relief permitted only on showing that "factual or legal basis for the claim was unavailable on the date the applicant filed the previous application," or that no reasonable juror would have found applicant guilty of underlying offense or eligible for sentence of death); Va. Code Ann. § 8.01-654(B)(2) ("No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition").

plainly serves the well-recognized interest in the finality of state court judgments"); *Rose*, 455 U.S. at 518 (citing *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490-491 (1973)) ("The exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings"). When a state has indicated, through its rules or decisions, or through other means, that its courts are willing and able to consider claims that might otherwise be deemed late or successive, a federal mandate requiring a prisoner to avail himself of that remedy only through forfeiture of future federal habeas review would be antithetical to the state interests underlying the exhaustion requirement and the limitations period. *See, e.g., O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) ("Comity thus dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief"). To be sure, cases involving such opportunities for further state court review will be rare, but when they do occur, it is stay-and-abeyance, not punitive dismissal, that will best serve the interests of the states.

By failing to adopt stay-and-abeyance, this Court would encourage even greater piecemeal litigation, which *Rose* and the total exhaustion rule sought to reduce. In the absence of an available stay-and-abeyance procedure, petitioners wary about a possible dismissal of their § 2254 petition after their one year AEDPA limitation has run are likely to file "protective" state court habeas petitions whenever they file federal habeas petitions.

Alternatively, absent stay-and-abeyance, § 2254 petitioners concerned about whether they have filed a mixed

petition may file early and repetitive motions with the district court, such as, " . . . asking the district court, at the time of filing the petition, to issue an immediate ruling regarding the exhaustion status of each claim and, if the court is unable to issue such a ruling promptly, to grant equitable tolling conditionally until the court can resolve the claims' exhaustion status and determine the need for a stay pending the prisoner's return to state court to exhaust any remaining state remedies". 1 Hertz & Liebman, *Federal Habeas Corpus Practice & Procedure* § 5.2b at p. 274 (4th Ed. 2001). If this Court places "petitioners in the position of having to employ such cumbersome and time-consuming measures, AEDPA's statute of limitations – a provision that was intended to 'reduce[ ] the potential for delay' – is likely to have the effect of 'impos[ing] a heavier burden on the strict courts.'" *Id.*, quoting *Duncan*, 533 U.S. at 179 (majority opinion) and at 192 (Breyer, J., dissenting).

In sum, the stay-and-abeyance procedure endorsed by several members of this Court and adopted by every court of appeals that has considered the issue (other than the Eighth Circuit) is fair, workable, sensible, and consistent with *Rose* and applicable law. *Duncan v. Walker*, 533 U.S. 167, 182 (2001) (Souter, J., concurring) ("nothing bars a district court from retaining jurisdiction pending complete exhaustion of state remedies"); *id.* at 182 (Stevens, J., concurring) ("in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies"); *Pliler v. Ford*, 124 S.Ct. 2441, 2448-49 (2004) (Ginsburg, J., dissenting); *id.* at p. 2450 (Breyer, J., dissenting) ("the other conditions that I raised in *Duncan* support the lawfulness of the

Ninth Circuit's stay-and-abeyance procedure"); *see also id.* at 2448 (O'Connor, J., concurring).

CONCLUSION

For the reasons contained in Petitioner's Brief on the Merits and in this Reply Brief, Petitioner Rhines requests that the Judgment of the United States Court of Appeals for the Eighth Circuit be reversed and that the Court uphold the district court's grant of the conditional stay of Rhines' federal habeas corpus petition.

Respectfully submitted,

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No. 03-9046

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IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RUSSELL RHINES, *Petitioner,*

v.

DOUGLAS WEBER, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, *Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, DELAWARE, GEORGIA, HAWAII, IDAHO, INDIANA, MARYLAND, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NORTH DAKOTA, OHIO, PENNSYLVANIA, TENNESSEE, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

May a federal court stay and hold in abeyance a "mixed" 28 U.S.C. § 2254 petition containing both exhausted and unexhausted claims — rather than dismiss it — to avoid the § 2244 statute of limitations while the petitioner returns again to state court to litigate the unexhausted claims?

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In the Supreme Court of the United States

No. 03-9046

CHARLES RUSSELL RHINES, *Petitioner,*

v.

DOUGLAS WEBER, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, *Respondent.*

INTEREST OF AMICI

Amici States have a compelling obligation to protect the finality of judgments rendered in their criminal courts. The undoing of this finality in federal habeas corpus proceedings undermines public safety, deterrence of crime, retribution, and effective rehabilitation; and the passage of time increases the risk of unfairness and inaccuracy in any later re-trial of the criminal case. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress enacted reforms that provide enhanced protections for finality, including a statute of limitations for the presentation of habeas corpus claims challenging state convictions. The "stay and abeyance" device urged by petitioner presents a grave threat to those reforms.

SUMMARY OF ARGUMENT

This Court has long held that district courts must dismiss habeas petitions containing both exhausted and unexhausted claims. *Rose* v. *Lundy*, 455 U.S. 509, 522 (1981); see also *Duncan* v. *Walker*, 533 U.S. 167, 178-79 (2001). Most recently, in *Pliler* v. *Ford*, 124 S. Ct. 2441, 2445 (2004), a majority of this Court confirmed the applicability of *Rose* v. *Lundy* to post-AEDPA cases, again emphasizing that "federal district courts must dismiss mixed habeas petitions[.]"

Petitioner Rhines advocates a stay and abeyance procedure for mixed habeas petitions that is inimical to both *Rose* v. *Lundy* and AEDPA. Under stay and abeyance, a mixed petition may be filed, complete dismissal avoided, unexhausted claims dismissed (or, in some circuits, retained, in further contravention of *Rose* v. *Lundy*), and a stay of federal proceedings obtained for the purpose of allowing the petitioner to return yet again to state court in order to present his unexhausted claims there. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to "relate back" to the original petition, even though they otherwise would be time-barred under 28 U.S.C. § 2244. This procedure, however, is contrary to the *Rose* v. *Lundy* exhaustion rule, as re-affirmed in AEDPA. And it is contrary to AEDPA's adoption of a limitations period that is tolled "for the pursuit of state remedies [but] not during the pendency of applications for federal review * * * ." *Duncan* v. *Walker*, 533 U.S. at 180.

Stay and abeyance also undermines AEDPA's increased protections for finality "by creating more potential for delay in the adjudication of federal law claims." See *Duncan* v. *Walker*, 533 U.S. at 180. Further, stay and abeyance encourages the filing of mixed petitions and the subsequent addition of newly-exhausted but time-barred claims; it thus "increases the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.* at 180; *Slayton* v. *Smith*, 404 U.S. 53 (1971) (*per curiam*) (disapproving the use of stay and abeyance in federal habeas proceedings).

Stay and abeyance presents an even greater potential for abuse in capital federal habeas cases like this one, where the incentive to "obtain[] speedy federal relief," *Rose* v. *Lundy*, 455 U.S. at 520 (plurality op.), is largely absent. See *Woodford* v. *Garceau*, 538 U.S. 202, 206 (2003) ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, * * * and 'to further the principles of comity, finality, and federalism' * * * ") (quoting *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000)).

With its attendant delay of federal proceedings, stay and abeyance is inconsistent with this Court's admonition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817-18 (1976). In addition, it "fails to account sufficiently for AEDPA's clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review." *Duncan* v. *Walker*, 533 U.S. at 181 (citing 28 U.S.C. §§ 2254(b), 2254(e)(2), & 2264(a)). If permitted by this Court, stay and abeyance would reduce district courts to what one lower court has described as "a jurisdictional parking lot." *Sterling* v. *Scott*, 57 F.3d 451, 454 (CA5 1995).

ARGUMENT

I.

THE STAY AND ABEYANCE OF MIXED HABEAS PETITIONS CONTRAVENES AEDPA'S RE-AFFIRMATION OF *ROSE* v. *LUNDY*

1. For over twenty years, this Court has unwaveringly held that "a total exhaustion rule promotes comity and does not unreasonably impair the prisoner's right to relief." *Rose* v. *Lundy*, 455 U.S. at 522; see also *id.* at 518-19 ("A rigorously enforced total exhaustion rule will encourage state prisoners to seek full relief first from the state courts, thus giving those courts the first opportunity to review all claims of constitutional error"); *Coleman* v. *Thompson*, 501 U.S. 722, 731 (1991) ("This Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to any of his federal claims"); *Castille* v. *Peoples*, 489 U.S. 346, 349 (1989) ("Respondent's habeas petition should have been dismissed if state remedies had not been exhausted as to any of the federal claims"); *Teague* v. *Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, * * * the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed"); *Engle* v. *Isaac*, 456 U.S. 107, 124 n.25 (1982) ("If [an unexhausted] claim were present, *Rose* v. *Lundy*, * * * would mandate dismissal of the entire petition").

In *Pliler* v. *Ford*, 124 S. Ct. at 2441, this Court applied the principles set forth in *Rose* v. *Lundy* to a post-AEDPA case and reiterated that "federal district courts must dismiss mixed habeas petitions[.]" *Id.* at 2445. As the Court observed in *Duncan* v. *Walker*, 533 U.S. at 167, AEDPA's exhaustion requirement "ensur[es] that the state courts have the opportunity fully to consider federal-law challenges to a

state custodial judgment before the lower federal courts may entertain a collateral attack upon that judgment." *Id.* at 178-79.

The dismissal of a mixed petition, however, is not without consequences:

> * * * The combined effect of *Rose* and AEDPA's limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all of his claims — including those already exhausted — because the limitations period could expire during the time a petitioner returns to state court to exhaust his unexhausted claims.

Pliler v. *Ford*, 124 S. Ct. at 2445.

Yet that is precisely what Congress contemplated in incorporating the statutory exhaustion requirement interpreted by this Court in *Rose* v. *Lundy*. Stay and abeyance, on the other hand, in effect tolls the AEDPA limitation period during the pendency of a federal habeas petition — in direct contravention of *Duncan* v. *Walker* — and "create[s] more opportunities for delay and piecemeal litigation without advancing the goals of comity and federalism that the exhaustion requirement serves." See *id.* at 180. As this Court observed in *Duncan*, "We do not believe that Congress designed the statute in this manner." *Id.* at 180.

Under stay and abeyance as it is practiced in most jurisdictions, a mixed federal habeas petition may be filed, unexhausted claims dismissed (or retained, as in the Third and Seventh Circuits), and a stay of the proceeding obtained for the purpose of allowing the petitioner yet another opportunity to exhaust those dismissed claims in state court. Once the dismissed claims are exhausted, they may be added to the stayed petition by way of amendment, and are deemed to

relate back to the original petition, even where exhaustion was commenced *after* the expiration of AEDPA's limitation period. See, e.g., *Crews* v. *Horn*, 360 F.3d 146, 152 (CA3 2004); *Nowaczyk* v. *Warden*, 299 F.3d 69, 79 (CA1 2002); *Palmer* v. *Carlton*, 276 F.3d 777, 781 (CA6 2002); *James* v. *Pliler*, 269 F.3d 1124, 1126-27 (CA9 2001); *Zarvela* v. *Artuz*, 254 F.3d 374, 381 (CA2 2001); *Freeman* v. *Page*, 208 F.3d 572, 577 (CA7 2000); *Brewer* v. *Johnson*, 139 F.3d 491, 493 (CA5 1998).[1/]

Stay and abeyance thus runs afoul of this Court's pronouncements that AEDPA's limitation period is tolled only during "the pursuit of state remedies *and not during the pendency of applications for federal review* * * *." *Duncan* v. *Walker*, 533 U.S. at 180 (emphasis added).

2. The requirement that a habeas petitioner exhaust his remedies prior to seeking relief in federal court is a long-standing mandate, founded upon principles of federalism and comity, and designed to ensure the prompt resolution of properly-brought claims. See *Rose* v. *Lundy*, 455 U.S. at 515 ("The exhaustion doctrine existed long before its codification by Congress in 1948"). In *Rose* v. *Lundy*, 455 U.S. at 509, this Court noted that the prior version of 28 U.S.C. § 2254 "expressly require[d] the prisoner to exhaust 'the remedies available in the courts of the State,'" *id.* at 519, and that, consequently, "a district court must dismiss habeas petitions

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1. Rhines states that, "[w]ith the exception of the United States Court of Appeals for the Eighth Circuit, every court of appeals that has resolved this issue has determined that staying a federal petition while state court proceedings are completed" is an appropriate means of complying with the dictates of *Rose* v. *Lundy*, while at the same time avoiding the application of the AEDPA limitation period. Pet'r Br. 9-10. A numerical majority, however, does not ensure that the practice at issue is correct. As this Court noted in *Rose*, only two courts of appeals at that time insisted on total exhaustion; the rest "permitted the District Courts to review the exhausted claims in a mixed petition containing both exhausted and unexhausted claims." *Rose* v. *Lundy*, 455 U.S. at 513 n.5.

containing both unexhausted and exhausted claims." *Id.* at 522. In addressing the lower court's failure to enforce that requirement, this Court stated:

> * * * [O]ur holdings today reflect our interpretation of a federal statute on the basis of its language and legislative history, and consistent with its underlying policies. There is no basis to believe that today's holdings will "complicate and delay" the resolution of habeas petitions * * *, or will serve to "trap the unwary *pro se* prisoner." * * * On the contrary, our interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court. * * *
>
> Rather than increasing the burden on federal courts, strict enforcement of the exhaustion requirement will encourage habeas petitioners to exhaust all of their claims in state court and to present the federal court with a single habeas petition. To the extent that the exhaustion requirement reduces piece-meal litigation, both the courts and the prisoners should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review.

Id. at 519-20.

A plurality nevertheless recognized that a total exhaustion rule could result in the foreclosure of certain legal options: "[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions." *Rose* v. *Lundy*, 455 U.S. at 520-21 (plurality op.).

AEDPA retains the exhaustion requirement of its predecessor statute. Under 28 U.S.C. § 2254(b)(1)(A), habeas relief is likewise prohibited unless "the applicant has exhausted the remedies available in the courts of the State * * * ." AEDPA departs from prior habeas jurisprudence, however, by imposing a one-year limitation period under § 2244(d)(1) to "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Subsection (d)(2) provides tolling of the limitation period for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * ."

In *Duncan* v. *Walker*, this Court explained:

> * * * The exhaustion rule promotes comity in that "'it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation.'" * * *
>
> The 1-year limitation period of § 2244(d)(1) quite plainly serves the well-recognized interest in the finality of state court judgments. * * * This provision reduces the potential for delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review.
>
> * * * *
>
> By tolling the limitation period for the pursuit of state remedies and not during the pendency of applications for federal review, § 2244(d)(2) provides a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower federal courts. * * *

Duncan v. *Walker*, 533 U.S. at 179-80.

Subsequently, in *Pliler* v. *Ford*, this Court emphasized that dismissal of mixed petitions *remains* the only proper course of action under *Rose* v. *Lundy*, notwithstanding AEDPA's newly-imposed limitation period. *Pliler* v. *Ford*, 124 S. Ct. at 2445. Indeed, because *Rose* v. *Lundy* was decided in 1981, and because AEDPA — which was enacted in 1996 — retains the statutory exhaustion requirement interpreted by that decision, Congress presumably intended *Rose* v. *Lundy* to apply to post-AEDPA cases. See *Williams* v. *Taylor*, 529 U.S. at 434 ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary"); see also *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978) ("[W]here * * * Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"); *United States* v. *Sisson*, 399 U.S. 267, 297-98 (1970) ("[T]he axiom that courts should endeavor to give statutory language that meaning that nurtures the policies underlying legislation is one that guides us when circumstances not plainly covered by the terms of a statute are subsumed by the underlying policies to which Congress was committed").

Moreover, the "design" of AEDPA, *Duncan* v. *Walker*, 533 U.S. at 180, is dependent upon *Rose* v. *Lundy*'s total exhaustion rule. See 141 Cong. Rec. S7847 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[T]his bill does not abolish [the] exhaustion requirement. Unli[k]e the resolution of this issue in the 1990 legislation, which passed the Senate, which eliminated the requirement of exhaustion of State remedies, that provision is not in this bill").

Rhines nevertheless argues that "[n]othing in * * * AEDPA prohibits a court from staying the exhausted claims of a mixed petition to allow a habeas petitioner to present

unexhausted claims to state court." Pet'r Br. 7. Not so. In *Slayton* v. *Smith*, 404 U.S. 53 (1971) (*per curiam*), a case that pre-dates *Rose* v. *Lundy*, this Court rejected the lower court's stay of a mixed habeas petition pending exhaustion of state remedies:

> * * * [A]bsent special circumstances, cf. *Nelson* v. *George*, 399 U.S. 224 (1970), *Wade* v. *Wilson*, 396 U.S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

Id. at 53-54; see also *id.* (remanding for further proceedings consistent with the opinion).

More recently, in *In re Blodgett*, 502 U.S. 236 (1992) (*per curiam*), this Court chastised a court of appeals over its lengthy stay of a federal habeas proceeding:

> * * * The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in *Rose* v. *Lundy*.

Id. at 239.

In drafting AEDPA, Congress presumably was aware of this Court's disapproval of stays of habeas proceedings. See *Williams* v. *Taylor*, 529 U.S. at 434. The fact that Congress did not create a "laundry list" of prohibited practices may not be regarded as tacit agreement with a procedure that has been

repeatedly rejected by this Court and that, as previously argued, would be inconsistent with AEDPA's statutory design. Cf. *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) ("Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion in a manner consistent with the objects of the statute").

Rhines argues that federal courts have "inherent" authority to stay federal actions in favor of parallel state proceedings to enable the federal actions to proceed without the risk of a time bar. Pet'r Br. 12. But the decisions relied upon by Rhines — *Wilton* v. *Seven Falls Co.*, 515 U.S. 277 (1995), and *Deakins* v. *Monaghan*, 484 U.S. 193 (1988) — involved *non-habeas proceedings* (actions for declaratory relief, and for damages and attorney's fees, respectively), where *dismissals* of the federal actions were contemplated upon resolution of the pending state-court actions. Stays of the federal actions were available merely to ensure that the federal actions would go forward in the event "the state case[s], for any reason, fail[ed] to resolve the matter[s] in controversy." *Wilton* v. *Seven Falls Co.*, 515 U.S. at 288 n.2. And, neither case was subject to exhaustion of state-court remedies as a pre-condition to filing in federal court.

Rhines also points to an almost decade-old study that suggests approximately fifty-seven percent of federal habeas petitions "are dismissed as containing unexhausted claims." Pet'r Br. 8, 26; see also *Pliler* v. *Ford*, 124 S. Ct. at 2450 (Breyer, J., dissenting); *Duncan* v. *Walker*, 533 U.S. at 186 (Breyer, J., dissenting). Aside from the fact that, as Rhines acknowledges, the study "apparently has not been updated," see Pet'r Br. 26 n.6, and thus may not reflect current trends, exhaustion is not a particularly difficult concept for a habeas petitioner to grasp. As this Court noted over twenty years ago:

> * * * §§ 2254(b), (c) provide[] a simple and clear instruction to potential litigants: before you

> bring any claims to federal court, be sure that you first have taken each one to state court. Just as *pro se* petitioners have managed to use the federal habeas machinery, so too should they be able to master this straightforward exhaustion requirement.

Rose v. *Lundy*, 455 U.S. at 520. Petitioner's cited study suggests, if anything, that habeas corpus petitioners have been too cavalier about the important federalism interests that support the total-exhaustion rule.

AEDPA re-affirms the importance of those interests and of that rule. AEDPA encourages the filing of exhausted federal habeas petitions by tolling the limitation period for properly-filed state petitions. "Section 2244(d)(1)'s limitation period and § 2244(d)(2)'s tolling provision, together with § 2254(b)'s exhaustion requirement, encourage litigants *first* to exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible." *Duncan* v. *Walker*, 533 U.S. at 181 (emphasis in original). The application of stay and abeyance would be "out of step with this design," "result[ing] in "[a] diminution of statutory incentives to proceed first in state court[, and] * * * the risk of the very piece-meal litigation that the exhaustion requirement is designed to reduce." *Id.* at 180.

The possibility that a refiled petition might be time-barred does not dictate a contrary result.[2/] Congress has afforded petitioners ample time — one year after the finality of their state-court convictions — to exhaust their claims

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2. The Eighth Circuit has suggested that a petitioner might avoid that consequence by simultaneously filing a "protective" petition in state court containing claims that may be unexhausted. See *Akins* v. *Kenney*, 341 F.3d 681, 685-86 (CA8 2003). Under § 2244(d)(2), the state-court filing would toll AEDPA's limitation period, thereby allowing the petitioner to refile in federal court in the event his initial federal petition is dismissed as unexhausted. See *id.*

before filing a federal habeas petition. The limitation period may be delayed further under § 2244(d) and, as noted, may also be tolled during the pendency of state habeas corpus proceedings. But Congress has made it clear that "[s]ection 2244(d)(2) * * * [does] not toll the limitation period during the pendency of * * * [a] federal habeas petition." *Duncan* v. *Walker*, 533 U.S. at 181-82; cf. *Rose* v. *Lundy*, 455 U.S. at 520 (plurality op.) ("By invoking this procedure [dismissal of unexhausted claims], * * * the prisoner would risk forfeiting consideration of his unexhausted claims in federal court. * * * Thus a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions").

Indeed, *Rose* v. *Lundy* appears to recognize that a total exhaustion rule will not "unreasonably impair the [petitioner's] right to relief," 455 U.S. at 522, as long as the petitioner is allowed to *re-file* his claims following the dismissal of a mixed petition. But *Rose* cannot be read as *requiring* the consideration of re-filed claims on the *merits*. Even before the enactment of AEDPA, re-filed claims could be summarily denied in federal court where, for example, the claims had been procedurally defaulted in state court on "independent and adequate" state-law grounds. See, e.g., *Coleman* v. *Thompson*, 501 U.S. at 731-32; *Castille* v. *Peoples*, 489 U.S. at 351-52; *Wainwright* v. *Sykes*, 433 U.S. 72, 81, 87 (1977); see also *Rose* v. *Lundy*, 455 U.S. at 521 (plurality opn.) ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions"); cf. *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) (allowing relief from procedural default based upon a showing of cause and prejudice); 28 U.S.C. § 2244(b)(2).

In addition, and contrary to Rhines's contention, AEDPA's limitation period, coupled with the total exhaustion requirement of *Rose v. Lundy*, does not constitute an

"unreasonab[e] impair[ment]" of a petitioner's right to relief. AEDPA does not impose a "blanket" restriction on a petitioner's ability to have his claim heard on the merits; instead, AEDPA recognizes that timeliness involves a "fact-intensive task," see *Pliler* v. *Ford*, 124 S. Ct. at 2446, which requires a case-by-case analysis of the applicability of statutory defenses to the limitation period. See 28 U.S.C. § 2244(d)(1).

Would-be federal habeas petitioners have one year from the date of finality of their state-court convictions (following at least one round of appeals in most instances) to file their federal habeas petitions. That one-year period may be further extended during the pendency of state post-conviction collateral challenges, which serve the dual purpose of tolling AEDPA's limitation period and exhausting previously-unpresented claims. See 28 U.S.C. § 2244(d)(2). Thus, there is simply no excuse for a petitioner's failure to comply with the requirements of *Rose* v. *Lundy* even in this "post-AEDPA world." See *Duncan* v. *Walker*, 533 U.S. at 182 (Stevens, J., concurring).

3. It may be argued, as suggested by the plurality in *Rose* v. *Lundy*, that unexhausted claims should be deleted from a mixed petition in lieu of complete dismissal. See 455 U.S. at 520-21 (plurality op.). But, even if such "purging" were authorized, the stay and abeyance of remaining claims would have the untoward effect of placing the federal habeas proceeding "on hold" indefinitely pending a petitioner's pursuit of state-court remedies. See *In re Blodgett*, 502 U.S. at 239.

Stay and abeyance frustrates *Rose* v. *Lundy* in other ways. Although *Rose* contemplated outright dismissal of a mixed petition, or perhaps the litigation of a petition purged of unexhausted claims, stay and abeyance encourages the filing of mixed petitions and eschews dismissal without obtaining the benefit of expeditious federal review of the exhausted claims. Indeed, the *Rose* plurality anticipated that

purged petitions would be resolved without delay, in warning that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions" under Rule 9(b) of the rules Governing Section 2254 Cases. 455 U.S. at 521. In contrast, under stay and abeyance, the federal proceeding is "held hostage" in favor of unexhausted claims that, under *Rose* v. *Lundy*, should play no role in federal review.

II.

THE STAY AND ABEYANCE OF MIXED HABEAS PETITIONS WOULD EVISCERATE AEDPA'S LIMITATION PERIOD

1. Stay and abeyance is also contrary to the limitation period of AEDPA, which likewise contemplates the expeditious resolution of habeas claims. As set forth previously, 28 U.S.C. § 2244(d)(1) imposes a one-year limitation period for "an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court." Subsection (d)(2) provides tolling for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending * * * ." Section 2244, as explained in *Duncan* v. *Walker*, does not allow tolling of the limitation period during the pendency of a federal petition. 533 U.S. at 181-82. Stay and abeyance, however, illegitimately affords such tolling by other means.

The practice of stay and abeyance is designed to bypass the limitation period of AEDPA, which "quite plainly serves the well-recognized interest in the finality of state court judgments." *Duncan* v. *Walker*, 533 U.S. at 179 (citing *Calderon* v. *Thompson*, 523 U.S. 538, 555-56 (1998)). As such, stay and abeyance "undermine[s] the interest in finality

by creating more potential for delay in the adjudication of federal law claims." *Duncan* v. *Walker*, 533 U.S. at 180. Indeed, it "increase[s] the risk of the very piecemeal litigation that the exhaustion requirement is designed to reduce." *Id.*; see also *Carey* v. *Saffold*, 536 U.S. 214, 226 (2002) (discussing AEDPA's "statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims"). No purpose is served by a stay of federal habeas proceedings except to defy Congressional intent and subvert AEDPA's limitation period. Any stay of federal habeas proceedings to allow petitioners to exhaust their state remedies would unduly delay the ultimate determination of the issues and reward those, like Rhines, who disregard the plain language of AEDPA and needlessly file mixed petitions.

As set forth previously, this Court long ago disapproved of the practice of stay and abeyance in habeas proceedings. In *Slayton* v. *Smith*, 404 U.S. at 53, the district court summarily dismissed a mixed petition. On appeal, the Fourth Circuit agreed that state remedies had not been exhausted, but vacated the district court's judgment and remanded for further proceedings with instructions to stay the case until the petitioner had sought relief in state court. *Id.* In rejecting that procedure, this Court held:

> The Court of Appeals' form of "abstention" is perhaps technically consistent with the statutory prohibition against issuing the writ where state remedies have not been exhausted. 28 U.S.C. § 2254. But, having determined that state remedies had not been exhausted, the Court of Appeals would have better served the policy of the statute had it avoided any implication as to the merits of so delicate a subject. Further, absent special circumstances, cf. *Nelson* v. *George*, 399 U.S. 224 (1970), *Wade* v. *Wilson*, 396 U.S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

Id. at 53-54.

2. Stay and abeyance has an even greater potential for abuse in capital federal habeas cases like this one, where the incentive to "obtain[] speedy federal relief," *Rose* v. *Lundy*, 455 U.S. at 520 (plurality op.), is largely absent. See *Woodford* v. *Garceau*, 538 U.S. at 206 ("Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, * * * and 'to further the principles of comity, finality, and federalism' * * * ") (quoting *Williams* v. *Taylor*, 529 U.S. at 436); cf. 141 Cong. Rec. S7804 (daily ed. June 7, 1995) (statement of Sen. Specter) ("[I]n the current context in which habeas corpus appeals now run for as long as a couple of decades, the deterrent effect of capital punishment has been virtually eliminated").

For example, in *Reno* v. *Woodford*, CV 96-2768, a capital federal habeas case currently pending in the Central District of California, the district court issued a stay of the federal habeas proceeding on May 7, 1999, ostensibly to permit the petitioner to file his unexhausted claims in the California Supreme Court. Almost *five years* passed before a state-court exhaustion petition was eventually filed on May 6, 2004. That petition will now require the state court to re-familiarize itself with a voluminous court file and resolve newly-raised claims, *eight years* after it last decided the case. See *People* v. *Memro*, 11 Cal. 4th 786 (1995), modified, 12 Cal. 4th 783D (1996). Although *Reno* represents a somewhat unusual example, multi-year delays have been experienced in other capital habeas cases filed in federal courts in California, as well as in the other amici states.

The potential for abuse, moreover, is not limited to capital federal habeas cases. Regardless of the petitioner's intent or purpose, stay and abeyance necessarily results in the suspension of *any* federal habeas proceeding pending the exhaustion of claims in state court. And, as this Court observed in *Pliler* v. *Ford*, 124 S. Ct. at 2446, "it is certainly the case that not every litigant seeks to maximize judicial process." In fact, under stay and abeyance, habeas petitioners have been allowed to file "serial" state-court exhaustion petitions, suspend their federal proceedings virtually at will, and to resume their federal collateral challenges with newly-exhausted (but time-barred) claims.

Stay and abeyance thus contravenes this Court's admonition that federal courts have a "virtually unflagging obligation * * * to exercise the jurisdiction given them." *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. at 817-18; see also *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *McCarthy* v. *Madigan*, 503 U.S. 140, 146 (1992); *In re Blodgett*, 502 U.S. at 239-40. Stay and abeyance, if given the imprimatur of this Court, would render AEDPA's limitation period virtually irrelevant, and reduce district courts to what one appellate court has aptly described as "a jurisdictional parking lot." *Sterling* v. *Scott*, 57 F.3d at 454.

CONCLUSION

For these reasons, the judgment of the Eighth Circuit should be affirmed.

Dated: October 25, 2004

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IN THE
Supreme Court of the United States

CHARLES RUSSELL RHINES,
Petitioner,

v.

DOUGLAS WEBER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

May a federal district court exercise its inherent authority to stay proceedings when faced with a mixed petition for federal habeas corpus relief, when a stay is necessary to permit a prisoner to present unexhausted claims to state court in the first instance and then to return to federal court for federal review of constitutional claims?

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IN THE

Supreme Court of the United States

No. 03-9046

CHARLES RUSSELL RHINES, *Petitioner*,
v.
DOUGLAS WEBER, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes

[1] This brief is filed with the written consent of both parties. No party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving federal habeas corpus. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts. NACDL has filed *amicus curiae* briefs in this Court in many cases involving federal habeas corpus, including cases raising issues similar to the one presented here. *See Pliler v. Ford*, 124 S. Ct. 2441 (2004); *Slack v. McDaniel*, 529 U.S. 473 (2000); *Stewart v. Martinez-Villareal*, 523 U.S. 637 (1998).

STATEMENT OF THE CASE

In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court held that a "mixed" habeas petition – that is, a petition raising both exhausted and unexhausted claims – should in most cases be dismissed "without prejudice," allowing the prisoner to exhaust state remedies and then return to federal court with a perfected petition. Fifteen years later, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which includes a one-year statute of limitations for the filing of federal habeas petitions. 28 U.S.C. § 2244(d)(1)(A). This case arises at the intersection of those two rules, when the return to federal court protected by *Rose* is threatened by the AEDPA limitations period. At issue is the solution – a stay of federal proceedings on a mixed petition – employed in every circuit other than the Eighth that has addressed the problem, designed to preserve *Rose* and cases like it and to ensure that AEDPA does not have the unintended effect of turning the exhaustion requirement into a "trap" that forever forecloses federal court review. *Rose*, 455 U.S. at 520.

1. Petitioner Charles Russell Rhines was convicted in state court in South Dakota of first-degree murder and third-degree burglary. On January 29, 1993, he was sentenced to death. Pet. App. 1:1.[2] His conviction and sentence became final when this Court denied certiorari review on December 2, 1996. *See Rhines v. South Dakota*, 519 U.S. 1013 (1996).

Petitioner promptly filed a state habeas corpus petition on December 5, 1996. That petition was denied by the state trial court on October 8, 1998, and the South Dakota Supreme Court denied petitioner's appeal on February 9, 2000. Pet. App. 1:1-2.

2. Petitioner then promptly filed the federal petition for habeas corpus now at issue. Pet. App. 1:2.[3] There is no question but that the petition was timely filed. Indeed, because AEDPA's statute of limitations was tolled while petitioner's state habeas petition was pending, *see Duncan v. Walker*, 533 U.S. 167 (2001), petitioner filed over eleven months before his one-year period had expired.

On July 3, 2002 – more than sixteen months after petitioner's timely filing – the district court held that petitioner had failed to exhaust certain of his claims. Pet. App. 1:10. Because the AEDPA one-year statute of limitations had then run, dismissal of the entire petition would have precluded federal-court review of any of petitioner's claims. *Id.* at 1:8-9. Accordingly, petitioner moved to "hold the petition in abeyance" while he presented his unexhausted claims to the state courts. *Id.* at 1:8.

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[2] Citations to the petitioner's appendix are in the form of [tab:page].

[3] In fact, petitioner signed and mailed his *pro se* petition a mere eight days after his appeal was denied by the South Dakota Supreme Court, on February 17, 2000. *See* Brief of Petitioner, Statement of the Case. The petition was actually filed in the district court five days later, on February 22, 2000. Whether petitioner's alacrity is measured by the mailing date or the filing date, it is clear that there was no delay involved.

Citing the concurring opinion of Justice Stevens in *Duncan*, 533 U.S. at 182-83, and decisions of several courts of appeals, the district court granted petitioner's request and agreed to "stay the petition" while petitioner exhausted his claims in state court. Pet. App. 1:8-9. The district court conditioned the stay, however, on prompt action by petitioner: petitioner was required to commence state court proceedings within 60 days of the district court's order and to return to the district court within 60 days of the completion of state court review. *Id.* at 1:10.

3. The State appealed the grant of a stay. In a brief *per curiam* decision, the Eighth Circuit reversed and vacated the district court stay order. Pet. App. 2:2. The court left open the possibility that, on remand, petitioner might be permitted to delete unexhausted claims from his petition and proceed on the exhausted claims. *Id.* But relying on *Akins v. Kenney*, 341 F.3d 681, 686 (8th Cir. 2003), which in turn relies on *Rose v. Lundy*, 455 U.S. 509 (1989), the court held that the district court was precluded from "staying Rhines's exhausted claims while he seeks state post-conviction relief on other claims that may be unexhausted." Pet. App. 2:2.

SUMMARY OF ARGUMENT

The issue in this case should not be controversial – and it is not in the lower courts. With the sole exception of the court below, every single federal court of appeals to consider the question has allowed for a stay of proceedings on mixed habeas petitions when AEDPA's statute of limitations otherwise would bar the filing of a perfected petition after full exhaustion. In the First, Second, Third, Fifth, Sixth, Seventh, and Ninth Circuits, that procedure has proven to be eminently workable, leaving district courts with ample discretion to prevent dilatory or abusive litigation tactics. There is no reason for this Court to disturb the sensible consensus that has emerged in courts around the country.

The court below erred in concluding that *Rose v. Lundy*, 455 U.S. 509 (1989) precludes a district court from staying proceedings when faced with a mixed petition. A stay of federal proceedings so that state courts may first review a prisoner's claims on the merits is entirely consistent with the comity principles that underlie *Rose* and does nothing to intrude on state prerogatives. Nor is there any indication, textual or otherwise, that AEDPA was intended to foreclose federal review of the claims of prisoners who file timely but mixed petitions by withdrawing from district courts their customary authority to issue stays. Such an outcome would run contrary to this Court's own decisions, which consistently protect the right of prisoners who file mixed petitions to return to federal court after presenting their claims in state proceedings.

Many members of this Court have recognized already that, in a post-AEDPA world, the stay procedures challenged by respondent are the only sensible way to effectuate the dual interests identified in *Rose*: the interest in allowing state courts the first opportunity to review prisoners' claims, and the interest in ensuring that federal habeas review is subsequently available to state prisoners. Virtually unanimously, the lower courts have come to the same conclusion. This Court should confirm that district courts may exercise their inherent authority to issue stays so that the filing of a mixed petition does not foreclose post-exhaustion federal review.

ARGUMENT

I. A STAY PENDING EXHAUSTION EFFECTUATES THE ESTABLISHED RULE THAT THE FILING OF A MIXED PETITION DOES NOT FORECLOSE FEDERAL REVIEW.

A. This Court's Decisions Protect The Right Of A Prisoner Who Files A Mixed Petition To Return To Federal Court After Fully Exhausting His Claims.

1. The requirement that prisoners exhaust state remedies before habeas relief may be granted by a federal court is not jurisdictional. *Granberry v. Greer*, 481 U.S. 129, 131 (1987); *Strickland v. Washington*, 466 U.S. 668, 679 (1984). Rather, though it furthers important comity interests, the exhaustion doctrine creates only a "technical procedural" requirement for a federal habeas petition. *Stewart v. Martinez-Villareal*, 523 U.S. 637, 645 (1998). As a result, this Court consistently has held that the failure to properly exhaust state remedies cannot "bar a prisoner from ever obtaining federal habeas review," *id.*, nor "bar a prisoner from raising non-frivolous claims" when "a federal court [has] yet to review a single constitutional claim," *Slack v. McDaniel*, 529 U.S. 473, 487 (2000). The exhaustion rule is not designed to "trap the unwary *pro se* prisoner." *Rose*, 455 U.S. at 520.

2. In a line of cases beginning with *Rose*, the Court has applied that principle to mixed petitions. In every one of those cases, the Court has held that a prisoner's failure to comply fully with the exhaustion requirement in the first instance does *not* deprive him of an opportunity for federal review of his claims. On the contrary, the Court has insisted on procedures that protect the right of a prisoner who files a mixed petition to return to federal court after fully exhausting state remedies.

At issue in *Rose* was whether a federal court faced with a mixed petition could consider all of the claims, including

those that were unexhausted. 455 U.S. at 519. The Court held that principles of comity forbid a federal district court from deciding claims that have not been presented to the state courts. *Id.* at 515, 519. At the same time, the Court carefully left open two alternate routes to federal court review. First, a prisoner seeking "speedy relief" could "delete the unexhausted claims" and proceed immediately in federal court on a now fully-exhausted petition, *id.* at 520 – but run the risk that a second federal petition raising newly exhausted claims might be dismissed under the "abuse of the writ" doctrine, *id.* at 521 (plurality opinion). Alternatively, a prisoner could ensure that all of his claims eventually would be heard in federal court by forgoing immediate review and opting instead for "total exhaustion." *Id.* at 522. To effectuate that choice, district courts were instructed to dismiss the entire mixed petition so that the prisoner could fully exhaust his state remedies *before returning to federal court* with one, now-perfected, petition. *Id.* at 514, 520. As this Court recently explained, dismissal under *Rose* always "contemplated that the prisoner could return to federal court after the requisite exhaustion." *Slack*, 529 U.S. at 486.

That right of return was safeguarded again in *Martinez-Villareal*. The question there was whether a federal habeas claim dismissed as "premature" and then reasserted when ripe could be barred as "successive" under AEDPA. 523 U.S. at 643. The Court held that there was no bar: "[O]nce the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied" and a habeas petitioner may return to federal court. *Id.* at 644. "To hold otherwise," the Court concluded, "would mean that a dismissal of a first habeas petition for technical procedural reasons would bar a prisoner from ever obtaining federal habeas review." *Id.* at 645.

Similarly, in *Slack*, the Court confirmed that dismissal of an initial petition as mixed does not preclude federal review once all claims are exhausted. Rejecting the state's argument

that any subsequent federal petition could be barred as "successive," the Court reaffirmed that prisoners who file mixed petitions may fully exhaust state remedies and then return to federal court for a hearing. 529 U.S. at 486; *id.* at 486-87 (under *Rose*, subsequent federal review may be precluded "only if a prisoner decline[s] to return to state court and decide[s] to proceed with his exhausted claims in federal court"). And under the "total exhaustion" option, claims not pressed in an initial petition nevertheless may be raised in a subsequent federal petition after the state-court exhaustion anticipated by *Rose*. *Id.* at 487.

In sum, this Court has consistently construed governing habeas law to protect the right of a prisoner who files a mixed petition to return to federal court once he has fully exhausted state remedies. As the Court concluded in *Slack*, any other rule "would be contrary to our admonition that the complete exhaustion rule is not to 'trap the unwary *pro se* petitioner.'" *Id.* (quoting *Rose*, 455 U.S. at 520).

B. A Stay Is Necessary To Effectuate The Right To Return To Federal Court.

1. A procedure for staying mixed petitions became necessary after AEDPA was enacted in 1996. When this Court adopted the "total exhaustion" rule in *Rose*, there was no statute of limitations for the filing of federal habeas petitions, and a prisoner seeking to file a second federal petition after fully exhausting state remedies faced no time bar. But AEDPA added to the mix a one-year statute of limitations, which in many cases would convert the procedures endorsed by *Rose* into a complete bar on federal review.

This case is a perfect example. There is no dispute but that Rhines's first habeas petition was filed within – and well within – AEDPA's one-year limitations period. But the district court did not decide that the petition included unexhausted claims until sixteen months later, *after* the AEDPA statute of limitations had expired. *See supra* at 3. As a result, *Rose*'s "total exhaustion" option was foreclosed; if the district court dismissed Rhines's petition to allow for exhaustion of as-yet unexhausted claims, Rhines would be time-barred when he sought to return to federal court with a perfected petition, and *none* of his claims would ever be reviewed in federal court.[4]

There is nothing unique about this case. As Justice Breyer explained in *Duncan v. Walker*, 533 U.S. 167, 186 (2001) (Breyer, J., dissenting), 57 percent of federal habeas petitions are dismissed for failure to completely exhaust state remedies. And on average, district courts take 268 days to dismiss petitions on procedural grounds. *Id.* That means that a prisoner who files a petition *within* the AEDPA limitations period often will have his petition dismissed as mixed only *after* the period has expired – when, absent a stay of federal proceedings, it will be impossible for him to file a subsequent perfected petition in federal court. Moreover, that outcome may have nothing to do with a prisoner's diligence and everything to do with which district court hears his case. "If Prisoner A and Prisoner B file mixed petitions in different district courts six months before the [] limitations period expires, and the court takes three months to dismiss Prisoner A's petition, but seven months to dismiss Prisoner B's petition, Prisoner A will be able to return to federal court after exhausting state remedies, but prisoner B – due to no fault of his own – may not." *Id.*

2. Respondent suggests that a prisoner may avoid foreclosure of federal review by making a "choice" to assert only exhausted claims in an initial petition. Cert. Opp. at 12. That is no answer to the problem. *Rose* and *Slack* protect the

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[4] If there are grounds for equitable tolling of AEDPA's statute of limitations in this case – which there may well be, *see* Pet. for Cert. at 3 – then petitioner would be permitted to file a fully exhausted petition after the limitation period ordinarily would have run. This brief does not address the equitable tolling issue, and proceeds on the assumption that such tolling might not be warranted in this or other cases.

right of prisoners to federal review even after filing *mixed* petitions. And they do so precisely because, as this Court has recognized, the exhaustion rule, straightforward in the abstract, is very difficult to navigate in practice – especially for the vast majority of prisoners who are proceeding *pro se*.[5]

Even the most diligent prisoner, for instance, may have difficulty identifying precisely which state remedies must be exhausted. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (applying exhaustion doctrine to requests for discretionary review). A prisoner or even a lawyer may draft inartfully, so that a constitutional claim is not pressed with adequate specificity or "factual commonality." *See* Pet. App. at 1:5 (petitioner "presented the legal substance of his claim to the state court," but failed to "present the same factual argument"). Or a state post-conviction petition may be procedurally deficient in some way – and thus lose the benefit of AEDPA's tolling provision for "properly filed" state pleadings. *See* 28 U.S.C. § 2244(d)(2).

The problem created by the interplay between *Rose*'s "total exhaustion" procedures and the AEDPA limitations period cannot be wished away by imagining a world in which good-faith litigants never "choose" to file mixed petitions. The rule adopted by the court below necessarily entails that some significant number of prisoners, acting with all due diligence, will file timely petitions that include unexhausted claims that can never be reviewed in federal court. The "total exhaustion" rule was not meant to operate as that kind of a "trap" for the "unwary *pro se* petitioner." *Slack*, 529 U.S. at 487.

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[5] Because this is a death case, petitioner was represented by counsel during federal habeas proceedings. *See* 21 U.S.C. § 848(q)(4)(B). But for habeas petitioners generally, that is the exception, not the rule. *See Duncan*, 533 U.S. at 191 (Breyer, J., dissenting) ("vast majority" of habeas petitions are filed *pro se*). This Court's rules must be designed with the *pro se* petitioner in mind.

II. THE STAY ENTERED BY THE DISTRICT COURT WAS WITHIN ITS DISCRETIONARY AUTHORITY.

Fortunately, nothing in AEDPA or this Court's cases requires such a draconian result. As Justice Stevens explained in his concurring opinion in *Duncan*: "[A]lthough the Court's pre-AEDPA decision in *Rose v. Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." 533 U.S. at 182-83.

That sensible solution has now been adopted by at least seven federal circuits – with the only dissenter the court of appeals below. *See Pliler v. Ford*, 124 S. Ct. 2441, 2448 (2004) (O'Connor, J., concurring). At least four Justices of this Court already have approved stays of federal habeas proceedings pending complete exhaustion, and a fifth has acknowledged the prevalence of the procedure without questioning its validity. *See Duncan*, 533 U.S. at 182 (Souter, J., concurring) ("nothing bars a district court from retaining jurisdiction pending complete exhaustion[]"); *id.* at 182-83 (Stevens, J., concurring) ("no reason" why district court should not "stay further proceedings" pending exhaustion); *id.* at 192 (Breyer & Ginsburg, JJ., dissenting) (referring to Justice Stevens' "sound suggestion" that courts stay mixed petitions pending exhaustion); *Pliler*, 124 S. Ct. at 2449-51 (Breyer, J., dissenting) (defending validity of "stay and abeyance" procedure); *id.* at 2448 (O'Connor, J., concurring) (though "stay and abeyance" procedure not before the Court, "not[ing] that the procedure is not an idiosyncratic one," and has in fact been approved by "seven of the eight Circuits to consider it"). And such stays are entirely consistent with both AEDPA and this Court's decisions.

A. *Rose* Does Not Preclude A Stay Of Federal Habeas Proceedings Pending Complete Exhaustion.

1. District courts have inherent authority to issue stays in proceedings before them. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936); *see also Arkadelphia Co. v. St. Louis Southwestern Ry. Co.*, 249 U.S. 134, 146 (1919) (power to stay proceedings is "inherent in every court" retaining jurisdiction over an action); *Clinton v. Jones*, 520 U.S. 681, 683 (1997) (district court has "broad discretion to stay proceedings as an incident to control of its own docket").

2. The Eighth Circuit is of the view that the authority of a district court to issue a stay evaporates when a mixed federal habeas petition is at issue, as a result of this Court's decision in *Rose v. Lundy*. *See Akins v. Kenney*, 341 F.3d 681, 686 (8th Cir. 2003). That position is incorrect. *Rose* holds that a federal district court may not *adjudicate* a habeas claim before it has been fairly presented to the state courts. 455 U.S. at 515; *cf.* 28 U.S.C. § 2254(b)(1) (federal habeas petition may not be "granted" prior to exhaustion). It would be an affront to comity and state sovereignty, the Court has explained, for a "federal district court to upset a state court conviction without [affording] an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford*, 339 U.S. 200, 204 (1950). A *stay* of federal habeas proceedings, on the other hand, simply defers federal-court action, *see id.*, while the state courts consider the merits of a prisoner's claims in the first instance. It is entirely consistent with the comity principles on which *Rose* is based, and does nothing to intrude on state prerogatives. *See Pliler*, 124 S. Ct. at 2450 (Breyer, J., dissenting) (stay procedure "recognizes the comity interests that *Rose* identified").[6]

3. That much is virtually common ground among the federal courts of appeals, with only the Eighth Circuit in dissent. *See, e.g.*, *Nowaczyk v. Warden*, 299 F.3d 69 (1st Cir. 2002); *Zarvela v. Artuz*, 254 F.3d 374 (2nd Cir. 2001); *Crews v. Horn*, 360 F.3d 146 (3rd Cir. 2004); *Brewer v. Johnson*, 139 F.3d 491 (5th Cir. 1998); *Palmer v. Carlton*, 276 F.3d 777 (6th Cir. 2002); *Freeman v. Page*, 208 F.3d 572 (7th Cir. 2000); *Calderon v. Taylor*, 134 F.3d 981 (9th Cir. 1998); *see generally Pliler*, 124 S. Ct. at 2448 (O'Connor, J., concurring) (describing circuit-court case law); *id.* at 2450 (Breyer, J., dissenting) (same). At a minimum, this Court should approve the "growing consensus" among the federal courts that a stay of proceedings on a mixed petition is well within a district court's discretion. *See Nowaczyk*, 299 F.3d at 79.

Where there is less consensus is on the precise nature of the stay of proceedings contemplated. On that subsidiary question, there is a difference among the circuit courts, though it is rarely addressed or even acknowledged. At least two federal courts of appeals have authorized district courts to stay mixed petitions in their entirety pending state-court

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[6] It is even clearer – and ought to be beyond dispute – that *Rose* permits a prisoner who files a mixed petition to forgo complete exhaustion, and instead to delete unexhausted claims and proceed immediately on those that are exhausted. The court below remanded so that the district court could consider the issue, noting only that "*Akins* did not decide whether a petitioner may delete unexhausted claims while proceeding only on the claims he believes are fully exhausted." Pet. App. 2:2. Though *Akins* did not decide that question, *Rose* did. *Rose* unambiguously and by terms gives a prisoner who files a mixed petition the "choice of returning to state court to exhaust his claims *or of amending or resubmitting the habeas petition to present only exhausted claims to the district court.*" *Rose*, 455 U.S. at 510 (emphasis added). To the extent there is any real confusion on the point, the Court should take this opportunity to reaffirm that a prisoner may withdraw unexhausted claims from a habeas petition and proceed with exhausted claims before the district court.

review of as-yet unexhausted claims. *See Crews*, 360 F.3d at 154 n.5 (3rd Cir.); *Freeman*, 208 F.3d at 576 (7th Cir.); *see also Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring) (suggesting that entire petition may be stayed); *id.* at 192 (Breyer, J., dissenting) (noting "Justice Stevens' sound suggestions that district courts hold mixed petitions in abeyance"). The district court in this case appears to have done just that, staying "the petition for habeas corpus" pending exhaustion of specified claims. Pet. App. 1:10. But other courts of appeals have endorsed a different procedure, of the sort described by this Court in *Pliler*: "[F]irst, dismissal of any unexhausted claims from the original mixed habeas petition; second, a stay of the remaining claims, pending exhaustion of the dismissed unexhausted claims in state court; and third, amendment of the original petition to add the newly exhausted claims that then relate back to the original petition." 124 S. Ct. at 2445; *see, e.g.*, *Zarvela*, 254 F.3d at 380 (2nd Cir.); *Palmer*, 276 F.3d at 781 (6th Cir.).

As petitioner demonstrates, that procedure – which amounts to a stay of a perfected petition – is fully consistent with *Rose*.[7]

[7] It is not entirely clear that the Eighth Circuit itself has disapproved staying a formerly mixed petition once it has been purged of unexhausted claims. In *Atkins*, the case on which the court of appeals placed exclusive reliance below, the court held only that a district court as a general rule "has no authority to hold a habeas petition *containing unexhausted claims* in abeyance." 341 F.3d at 686 (quoting *Carmichael v. White*, 163 F.3d 1044, 1045 (8th Cir. 1998) (emphasis added). The *per curiam* decision below – without acknowledging any shift – cites *Atkins* for a different proposition: that the district court lacked authority to "stay[] Rhine's exhausted claims while he seeks state post-conviction relief on other claims that may be unexhausted." Pet. App. 2:2. To add to the confusion, the district court appears not, in fact, to have stayed the mixed petition in its entirety – so that the *per curiam* decision's recasting of *Atkins* was unnecessary to its holding. It may well be that the Eight Circuit simply has not considered or addressed the distinction between staying a mixed petition in its entirety and staying a petition once unexhausted claims have been dismissed.

But the better approach is for district courts simply to stay mixed petitions in their entirety. As compared to the tripartite "dismiss, stay, and amend" procedure, a one-step stay has a decided advantage in terms of judicial economy: there is no initial dismissal of unexhausted claims and, because all originally-filed claims are held in abeyance, there is no need for a prisoner to file an amended petition – itself a significant undertaking in many habeas cases - to add subsequently exhausted claims when he returns to federal court As a result, there is also no need for litigation on the ancillary issue of amendment. *See Crews*, 360 F.3d at 154 n.5 (stay of entire petition "will conserve judicial resources by avoiding litigation" over which claims may be added by amendment).

Amicus believes that holding a mixed petition in abeyance is fully consistent with *Rose*'s prohibition on adjudication of unexhausted claims. Whether a stay covers an entire petition or only unexhausted claims makes no difference to the core concerns underlying *Rose*; either way, state courts are given the first opportunity to pass on the merits of all claims. *See supra* at 12. To the extent the Court disagrees, and believes that the procedure endorsed in *Rose* precludes a stay of a petition that includes unexhausted as well as exhausted claims, then it is time to revisit that procedure. *See Pliler*, 124 S. Ct. at 2448 n.2 (Ginsburg, J., dissenting) (noting question as to whether *Rose*'s solution to mixed petitions "bears reexamination in light of [AEDPA's] one-year statute of limitations"); *Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring) (questioning whether *Rose*'s "prescri[ption]" of dismissal for mixed petitions should govern in "post-AEDPA world"). When *Rose* approved a process by which mixed petitions were dismissed, it was as a means to end: by allowing a prisoner to exhaust fully and then return to federal court, it vindicated both comity principles and the interest in federal-court review of constitutional claims. *See Pliler*, 124 S. Ct. at 2450 (Beyer, J., dissenting). Adhering to that process when it no longer serves those ends elevates what is

purely form over substance – and in a way that has devastating consequences for the "longstanding constitutional interest in making habeas corpus available to state prisoners." *Id.*

B. AEDPA Does Not Preclude A Stay Of Federal Habeas Proceedings Pending Complete Exhaustion.

Though the Eighth Circuit seems to have relied exclusively on *Rose v. Lundy* for its position, *see Akins*, 341 F.3d at 686, respondent also suggests that a stay of proceedings would be inconsistent with AEDPA and its one-year limitations period. *See* Cert. Opp. at 10-11. But nothing in AEDPA or its statute of limitations precludes a district court from staying a timely filed habeas petition.

1. The two provisions of AEDPA at issue in this case are the one-year statute of limitations, 28 U.S.C. § 2244(d)(1), and the rule that a federal habeas provision "shall not be granted unless it appears that," *inter alia*, "the applicant has exhausted the remedies available in the courts of the State," *id.* at § 2254(b)(1). The stay procedures in wide use around the country are not at odds with either of those provisions. Stays may be issued only when, as in this case, an initial federal petition is filed within the one-year statute of limitations. And the issuance of a stay obviously does not constitute a pre-exhaustion "grant[]" of relief prohibited by § 2254(b)(1). Nothing in AEDPA by terms overrides a district court's inherent authority to issue a stay, and that should be the end of the matter. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (where "statutory language provides a clear answer," inquiry into statutory construction is at an end).

2. With no textual support for its position, respondent falls back on the argument that stay procedures, because they extend consideration of petitions beyond the one-year limitations period, are inconsistent with the purpose (if not the language) of AEDPA's statute of limitations. But that argument fundamentally misconceives the relationship between a stay

of proceedings and a statute of limitations. On respondent's view, a stay of proceedings is necessarily inappropriate if it would avoid what otherwise would be a time bar. But on this Court's view, the opposite is true: a stay may be appropriate precisely *because* it would avoid what otherwise would be a statute-of-limitations problem. *See, e.g., Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) (as between staying or dismissing an action in favor of parallel state proceedings, "a stay will often be the prefer[red] course, because it assures that the federal action can proceed without risk of a time bar"); *Deakins v. Monaghan*, 484 U.S. 193, 203 n.7 (1988) (approving stay because, "unless [the federal court] retained jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations"). Respondent's theory – that a statute of limitations is by itself somehow at odds with exercise of a district court's inherent authority to stay an action – cannot be reconciled with this established law.

Nor is respondent's proposed rule tailored to its objection on timeliness grounds. The decision below does not prohibit the issuance of a stay only after the AEDPA limitations period has run, or when a stay would extend consideration of a petition until after that date. It prohibits the issuance of a stay in *all* cases, whether or not a time-bar would thereby be avoided. Even if a district court wished to issue a short stay well before the limitations period had run – for instance, to avoid piecemeal consideration of claims when all will soon be exhausted – it could not do so. There are all kinds of routine case-management reasons for a district court to issue a stay of proceedings on a mixed habeas petition, as in other contexts. But under respondent's rule, no such stay could issue – regardless of whether the stay would have any effect at all on AEDPA's statute of limitations.

3. Respondent also argues that stays pending exhaustion are inconsistent with AEDPA's tolling provision, 28 U.S.C. §

2244(d)(2), as construed in *Duncan v. Walker*, 533 U.S. 167, 181-82 (2001). According to respondent, a stay pending exhaustion effectively "nullif[ies]" *Duncan*'s conclusion that the AEDPA statute of limitations is not tolled while federal, rather than state, post-conviction review is pending. Cert. Opp. at 11. In fact, a stay pending exhaustion does not have the same effect as tolling the limitations period during federal post-conviction proceedings: because a stay is discretionary, not automatic, it can be tailored or even withheld to avoid abusive litigation tactics, *see infra* at 19, and cannot be relied on by a prisoner in the same way as could a tolling provision that applied whenever a federal petition was pending. In any event, the majority in *Duncan* limited itself to a narrow question of statutory construction, and did not comment at all on the stay procedure endorsed by Justices Stevens and Souter in that case. *See* 533 U.S. at 181 (reserving question). *Duncan* in no way forecloses use of the stay procedures at issue in this case.

III. THE STAY PROCEDURES CHALLENGED BY RESPONDENT ARE SENSIBLE AND WORKABLE.

As shown above, rigid application of *Rose*'s "total exhaustion" procedure, combined with AEDPA's one-year statute of limitations, threatens the well-established principle that a prisoner who timely files a mixed petition may refile a perfected one after exhausting state remedies. As also demonstrated, there is no indication – textual or otherwise – that Congress actually intended that result. *See also Duncan*, 533 U.S. at 183 (Stevens, J., concurring) (referring to "reasonable belief that Congress could not have intended to bar federal habeas review for petitioners who invoke the court's jurisdiction within the 1-year interval prescribed by AEDPA"). Faced with that problem, the lower courts – with only the Eighth Circuit disagreeing – have crafted a sensible and workable solution that protects the continued vitality of cases

like *Rose*, *Martinez-Villareal*, and *Slack* without requiring district courts to overstep their authority.

1. As discussed above, *see supra* at 13-15, there is some variance in the particular procedures employed by courts around the country to stay proceedings on a mixed petition. But the basic contours of the rule are the same from circuit to circuit. A district court faced with a mixed petition has the authority to hold the federal proceedings in abeyance, either by staying the whole petition or by dismissing unexhausted claims and staying the remainder. Where the court dismisses unexhausted claims, it may permit the prisoner to reinstate those claims, once they are exhausted, by way of amendment under the "relation back" doctrine. *See Pliler*, 124 S. Ct. at 2445 (describing "stay and abeyance" procedure). The authority to stay, like the authority to permit amendment, is discretionary. But if AEDPA's limitations period is likely to bar the filing of a perfected petition after exhaustion, then denial of a stay generally will constitute an abuse of discretion. In other words, a stay will be "preferable" in many cases and will be "the only appropriate course . . . where an outright dismissal could jeopardize the timeliness of a collateral attack." *Zarvela*, 254 F.3d at 380 (internal quotation omitted); *see also Freeman*, 208 F.3d at 576 (Easterbrook, J.), *Nowaczyk*, 299 F.3d at 79; *Palmer*, 276 F.3d at 781; *Crews*, 360 F.3d at 152.

2. Respondent argues that stays pending exhaustion will encourage undue delay and abusive litigation. Cert. Opp. at 12. But non-capital petitioners – the vast majority of habeas petitioners – have no incentive whatsoever to engage in dilatory tactics. For non-capital prisoners, the point is to move as quickly as possible toward potential relief through federal-court adjudication of a fully exhausted petition. *See Rose*, 455 U.S. at 520 (prisoner's "principal interest, of course, is in obtaining speedy federal relief on his claims"); *Duncan*, 533 U.S. at 191 (Breyer, J., dissenting).

In any event, and even with respect to capital petitioners like Rhines, there are ample means of preventing dilatory litigation of the sort the State hypothesizes. First, AEDPA itself checks abusive litigation practices by permitting district courts to dismiss even mixed petitions on the merits if they raise insubstantial claims. 28 U.S.C. § 2254(b)(2); *see Duncan*, 533 U.S. at 182-83 (Stevens, J., concurring). And concerns that prisoners will prolong federal stays by "running out the clock" with repeated state filings, *see* Cert. Opp. at 12, are largely addressed by the states' own procedural rules. *See Slack*, 529 U.S. at 489 (states "remain free to impose proper procedural bars to restrict repeated returns to state court for post-conviction proceedings").

Perhaps most important, discretionary stay procedures give district courts the flexibility they need to prevent dilatory or repetitive litigation. Though granting a stay ordinarily will be appropriate when a post-exhaustion filing otherwise would be time-barred, district courts may deny a stay or permission to amend when a prisoner has not exercised reasonable diligence. *See Zarvela*, 254 F.3d at 380-81. They may also, in their discretion, condition or limit their stays and the amendments they will allow. If a prisoner may be contemplating the filing of multiple mixed petitions, then a district court can grant a stay but order that the prisoner present only fully exhausted claims in his next federal pleading, on pain of dismissal with prejudice. *See Slack*, 529 U.S. 490. If a court is worried that a prisoner will unduly delay in pursuing state remedies, then it can put time limits on its stay. Following the lead of the Second Circuit, for instance, the district court below conditioned its stay on petitioner's initiation of state-court exhaustion proceedings within 60 days of its order, and a return to federal court within 60 days after exhaustion is completed. *Supra* at 4; *see Zavala*, 254 F.3d at 2[illegible]1 (stays ordinarily conditioned on speedy commencement of exhaustion and return to federal court); *see Palmer*, 276 F.3d at 781 (approving Second Circuit approach). This list is

not exhaustive. The point is that stay procedures, rooted in the equitable discretion of district courts, allow for a case-specific approach that precludes abusive tactics without foreclosing federal review for diligent and good-faith litigants.

3. The stay procedures adopted by lower courts respond to a real problem. If for some reason they were unavailable, then other responses would take their place. And the most likely alternatives would raise serious concerns that the stay procedures do not.

If district courts cannot stay proceedings on mixed petitions, then prisoners may be advised by counsel, or on their own decide, to "take precautionary measures to guard against . . .being penalized [if] the district court judge takes a long time to rule upon the exhaustion status of the petition." R. Hertz & J. Liebman, 1 *Federal Habeas Practice and Procedure* § 5b, at 274 (4th ed. 2001). One such precaution might be to capitalize on AEDPA's tolling provision by filing unnecessary or redundant state-court petitions in order to "stop the clock" while a federal district court considers exhaustion. That route, which would require state courts to adjudicate frivolous or already-exhausted claims, would undermine the comity principles identified by *Rose* in a way that stay procedures do not. Less troubling on comity grounds, but still wildly inefficient, would be an alternative that shifts the burden to the district courts: prisoners could ask those courts for emergency rulings on exhaustion, and seek equitable tolling if such rulings were not forthcoming. *Id.* Even assuming that district courts could and would act quickly on such requests, the procedure, as its proponents acknowledge, would be "cumbersome and time-consuming," at the expense of the federal courts. *Id.*

It is for good reason that the stay procedure at issue has been adopted by virtually every court to consider the question. That stay procedure is flexible enough to protect the right of good-faith litigants to federal-court review while at

the same time preventing abusive litigation tactics, and is far superior to alternative solutions to the same problem.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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